

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 17 June 2021

Public Authority: Network Rail

Address: The Quadrant: MK Elder Gate
Milton Keynes
MK9 1EN

Decision (including any steps ordered)

1. The complainant has requested information from Network Rail regarding injuries, fatalities and deaths linked with electrocution. Network Rail disclosed some of the requested information to the complainant, however it withheld the remainder ("the withheld information"), citing sections 38(1)(a) and (b) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that Network Rail has correctly applied the above exemptions to the withheld information and therefore the Commissioner requires no steps to be taken.

Request and response

3. On 19 October 2019 the complainant made the following request for information under the FOIA:-

"Please may I see your annual listings of injuries & deaths to

A. passengers.

B. workers.

C. trespassers & the non travelling public.

due to your 25kv ac overhead lines & separately due to your third Rail 750v dc systems.

Can I have this data from October 2002 until now"

4. Network Rail responded on 14 November 2019 and provided the requested information in full.
5. On 17 November 2019 the complainant submitted a second request for the information, which asked for the following:

"You include 2019 figures, what period is that for?"

And do you follow up the injuries to see if a court concluded they subsequently lead to death?"

Can you give the railway location of each of the fatalities just for 2009 & 2019 & any brief commentary associated with each fatality please?"

6. Network Rail responded on 16 December 2019, providing information in relation to the first two points. In relation to the third point, it refused to provide the requested information citing section 38(1)(a) and (b) of the FOIA as a basis for non-disclosure.
7. The complainant requested an internal review on 20 December 2019. Network Rail acknowledged that this also contained a new request for information, namely **"victims' names and the exact date of each fatality caused by traction electrocution for incidents recorded in 2009 and 2019."** The reviewer stated that this could not be dealt with as part of the review as that was only in relation to the complainant's existing requests. She explained that the new request would be dealt with separately.
8. In relation to the complainant's request of 17 November 2019, the internal review response was provided to him on 13 February 2020. The reviewer upheld the original decision.
9. In relation to the new request contained in the complainant's correspondence of 20 December 2019, Network Rail provided a response to this on 13 February 2020 also, stating that sections 38(1)(a) and (b) of the FOIA also applied to that request. An internal review response to the complainant's request for one was provided on 20 April 2020. The reviewer upheld the application of the above sections of the FOIA to the request.
10. On 3 December 2020 Network Rail provided the complainant with some additional information and further explanations as to its application of the specified exemptions. It also sent him links to published Coroner's

Reports and stated that it should have applied section 21 of the FOIA to some of the requested information and provided links to the reports at the time of the request.

Scope of the case

11. The complainant wrote to the Commissioner on 25 April 2020 to complain about Network Rail's handling of his request.
12. The Commissioner has considered Network Rail's handling of the complainant's request, in particular its application of the exemptions as set out in sections 38(1)(a) and (b) of the FOIA.

Reasons for decision

Section 38 - health and safety

13. Section 38(1) of the FOIA states that: "Information is exempt information if its disclosure under this Act, would, or would be likely to –
 - (a) endanger the physical or mental health of any individual
 - (b) endanger the safety of any individual."
14. In her guidance on section 38, the Commissioner's view is that the use of the term 'endanger' equates to 'prejudice' and that section 38 is subject to the prejudice test. Accordingly, in order to be engaged, it must meet the criteria set out in paragraph 14 above.
15. The Commissioner's guidance on section 38 states:

"In order to engage this exemption the public authority must demonstrate that there is a causal link between the endangerment and disclosure of the information. The public authority must also show that disclosure would, or would be likely to, have a detrimental effect on the physical or mental health of any individual, or the safety of any individual. The effect must be more than trivial or insignificant".
16. Section 38 is a qualified exemption and is therefore subject to the public interest test.
17. As is her practice in a case such as this, and given that Network Rail considered that both limbs of the exemption apply, the Commissioner asked Network Rail to explain:-
 - Why disclosure of the withheld information would or would be likely to endanger the physical or mental health of an individual

- Why disclosure of the withheld information would or would be likely to endanger the safety of an individual.
18. Network Rail explained that its starting point is the Commissioner's guidance on applying exemptions with a prejudice, adverse effect or other harm-based test, which reminds public authorities that disclosure under both the FOIA and the EIR must assess the nature and impact of 'prejudice' and 'adverse effect' in terms of a disclosure to the wider public, not simply to the requester. The guidance states as follows:-
- "43. In keeping with the general principle that disclosure is to the world at large, when an authority is considering an exemption with an associated prejudice test, that test should focus on the consequences of disclosing the information to the wider public.*
- 44. This means that the key question the authority must consider is whether there is a real and significant chance that a member of the wider public will use the information in a manner that would prejudice the interests protected by the exemption.*
- 45. The test is therefore not so much about the identity and motivation of the individual requester, but rather the purposes for which that information is likely to be used if released into the public domain."*
19. Network Rail stated that, in order to understand the prejudice in this case, the withheld information must be placed in the wider context of railway fatalities and the impact that each of these tragic occurrences has on the families and friends of the person who has lost their life, as well as on those who may have had no connection to events or the person involved, but who may be drawn to the railway as a way of ending their own life.
20. Network Rail outlined its belief that disclosure of the specific information held by it would be likely to cause distress to the families of the persons involved. It has directed the requester to those cases published in official reports, but where it has been unable to locate these names in official publications (as opposed to unofficial media reports), it considers that it would cause distress if it were to publicly disclose those names in an unrestricted way and without consultation with the families themselves. Network Rail considers that this also applies to the operational records which describe the circumstances at the time of the fatalities; while it obviously would not accept media reporting as being confirmed, accurate and detailed accounts of these incidents, it is important to note that the withheld information contains greater detail than any public account, with the possible exception of the Coroner's reports.

21. Network Rail's view of the distress that would be likely to be caused is drawn from the experience of its safety experts, a number of whom directly liaise with families who have suffered bereavement as the result of an accident on the railway, and is also informed by views given by the British Transport Police on this type of information. It also referred the Commissioner to published material which articulates how families may feel in these circumstances - British Transport Police guidance acknowledges how distressing press and social media interest in a death on the railway can be for the people who are close to the person who has died and feelings of grief will continue to occur in the years after the event.
22. With regard to the 'causal link' between disclosure of the information and the likely resulting endangerment, Network Rail considers that if the details held by it were placed in the public domain where they could be linked to existing media reporting of recent and historic incidents and 're-circulated' via social media, this would be likely to cause significant distress to family members and endanger their mental health. Network Rail also notes that revealing the location, date and description of a fatality on the railway carries the recognised risk that some people may wish to leave tributes or create memorials, in this way risking their own safety near the railway line.
23. However, in the view of Network Rail, the most important factor is that the nature and content of the withheld information in this case would be likely to affect vulnerable individuals who may be minded towards taking their own lives. The Office of Rail and Road (ORR – the regulator for rail safety) and the Rail Safety and Standards Board (RSSB) publish annual rail safety statistics, including passenger, workforce and public fatalities. These report on fatalities across the rail industry, including passenger fatalities which have taken place in stations and on trains, as well as "public fatalities" defined as "suicides, trespassing fatalities, and fatalities to people that did not take place in stations or on trains." The ORR reports that there were 21 non-suicide public fatalities in 2019-20; 17 of these were trespassers, two of the fatalities were level crossing users, and two were other non-suicide fatalities. 283 public fatalities in 2019-20 were as a result of suicide or suspected suicide.
24. The ORR also reports that this is the highest number since 2014-15, and the third year in a row that the number of suicide fatalities have increased. The RSSB's report "Public Behaviour 2019/20: A summary of health and safety performance, operational learning and risk reduction activities on Britain's railway" provides further statistics and commentary on rail fatalities. These publications demonstrate that the vast majority of railway fatalities relate to suicide, and it is the opinion of Network Rail that the public perception of all rail fatalities is strongly influenced by the predominance of suicides.

25. Network Rail acknowledges that not all of the withheld information in this case concerns suicides – and it also acknowledges that the thought that an accident on the railway was being presented as a suicide when it was not would cause even greater distress to the families of those who died. This is a difficult and sensitive situation, as the second reason that Network Rail considers that disclosure of the withheld information would be likely to endanger the health or safety of certain individuals is because there is a wider public perception which firmly links all railway fatalities with suicide.
26. Due to the nature and content of the withheld information, Network Rail's view is that disclosure of this information gives clear indications of where and how the track can be accessed at these locations. The information also clearly shows the fatal consequences of doing so in each of these instances. Network Rail's view is that this would be likely to encourage minded individuals to attempt to access the track in these places with a view to taking their own life.
27. The basis for this view is that Network Rail has a suicide prevention programme and works in partnership with the wider rail industry, the Samaritans and the British Transport Police to reduce suicide on the railway. It also work closely with other suicide prevention experts, national agencies and charities such as Public Health England and the National Suicide Prevention Alliance (NSPA). There is a body of research which demonstrates that people, intent on ending their own lives, are drawn to places where completed suicides have previously taken place. Though fatalities on the rail network can take place due to trespass incidents where the individual did not intend to take their own lives, it is widely considered by experts that the majority of individuals, on hearing of a fatality on the rail network, will assume the incident to have been an act of suicide rather than an accident. In this way, disclosing detailed information about fatalities on the railway and their locations would be likely to cause harm to members of the public by providing information which may lead to a rise in acts of suicide on the rail network.
28. This position was successfully put forward in the First-Tier Tribunal case of Transport for London v Information Commissioner and Neil Hood.¹ In

¹ EA/2018/0234

the appeal, the requester sought data on "Person Under A Train" (PUT) incidents, including the locations at which the incidents took place. Transport for London's ("TfL") former Suicide Prevention Lead gave evidence explaining that publishing information on PUT incidents contravened advice given to the rail industry by the Samaritans and the World Health Organisation (WHO) as detailed below:

"Railway stations, railway bridges and level crossings are highly visible locations and risk becoming a known location, especially if they are repeatedly referred to in the media. It is vital that the media does not contribute to a specific location, on or near the railways, becoming a setting that vulnerable people could identify as an easily accessible place to take their own lives. Avoid providing detailed information about the site of a completed or attempted suicide. Sometimes a location can develop a reputation as a 'suicide site' – e.g. a bridge, a tall building, a cliff or a railway station or crossing where fatal or non-fatal suicide attempts have occurred. Particular care should be taken by media professionals not to promote such locations as suicide sites by, for example, using sensationalist language to describe them or overplaying the number of incidents occurring at them."

29. The type of information considered by the First-Tier Tribunal differed from the current case in that it concerned only statistical information and not wider descriptive details. However, TfL's concern was that even statistical data could be used to create a "league table" which could be circulated or used by vulnerable persons. TfL's witness particularly noted the range of information available about methods of suicide, and the recognition that use of the rail infrastructure is one of the most lethal and accessible methods.
30. Network Rail considers that the points made by TfL are equally relevant in this case, where a public and uncontrolled disclosure of various detailed information about fatalities can be expected to generate comment on social media where it can be viewed and shared widely. It appreciates that the requester in this case does not seek information specifically about suicides, rather he seeks details about fatalities caused by electrocution, and that these may be due to accident, trespass or suicide. However, this is a further similarity with the First-Tier Tribunal, which heard evidence from both TfL and Network Rail that the precise nature of a fatality on the railway is secondary to a wider public perception which links railway fatalities and suicide. It is this perception that creates the risk of harmful consequences resulting in the disclosure of information about fatalities on the railway.
31. The Tribunal in the case above identified the key question as being the extent to which disclosure is likely to cause suicide attempts on the London Underground, and so endanger health and safety in the ways set

out above; the Tribunal considered that the evidence provided to them was sufficient to meet the test that the prejudice would be likely. Network Rail considers that there is significant similarity between the appeal considered by the Tribunal, and the information requested in the present case, where the information not only reveals locations where the track has been accessed, but also descriptive details of how these fatalities occurred.

39. Having perused the withheld information and considered the submissions of both the complainant and Network Rail, the Commissioner concludes that Network Rail has demonstrated that endangerment to the physical or mental health and safety of individuals would be likely to occur as a result of disclosure of the withheld information. Therefore the Commissioner considers that Network Rail has correctly engaged Section 38(1) of the FOIA. As this is a qualified exemption, the Commissioner will now consider the public interest arguments.

Public interest arguments

The complainant's position

40. The complainant made a number of points in relation to public interest arguments. He stated that the names, exact location & date of death are already in the public domain on the web site of the chief Coroner & Coroners' individual web sites. Additionally most, if not all, of the deaths have been reported in the media.
41. The complainant also stated that railway electrocutions are a matter of grave public interest and grief, so they are almost always reported, which brings them into the public arena where they remain. The complainant therefore considers that there is no downside to weigh against the public interest in making sure the statistics Network Rail have provided are accurate.
42. The complainant further stated that in some of the years provided they are very seriously different from the Coroners' figures and statistics from other sources, and that it is a matter of public interest that the figures provided are correct as they are taken on trust by public bodies and political leaders who need to be able to check accurate data and use it to make decisions. He also pointed out that names, dates and locations are already available and that he wishes to check Network Rail's figures against data from other sources.

Network Rail's position

43. Network Rail began its consideration of the public interest by noting the Information Commissioner's guidance which makes clear that the public

interest is not necessarily the same as what interests the public. The fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing the information that has been requested about it.²

44. The Information Commissioner's guidance gives the example of *Guardian Newspapers Ltd and Heather Brooke v the Information Commissioner and the British Broadcasting Corporation* (EA/2006/0011 and 0013, 8 January 2007), where the Information Tribunal said at paragraph 34:

"There is a wide difference between what is interesting to the public and what it is in the public interest to make known."

45. Network Rail recognises that details of fatalities attract media reporting and are something that the public may be 'interested' in, however it is of the view that in this case it is important to consider the public interest in terms of wider benefit to the public. In this sense, there is a clear public interest in transparency in matters of public concern and public safety, and Network Rail notes the complainant's view that there is a public interest in disclosing accurate details as "They are taken on trust by public bodies and political leaders who use them to make decisions."
46. Network Rail pointed out that the information the complainant seeks from Network Rail concerns only those fatalities in those areas of the railway where it has responsibility, and that it could not provide information which may be held by other rail organisations who are responsible for recording those fatalities within their remit, so even full disclosure in this instance could not provide the complete picture he seeks; however, Network Rail agrees that there is a public interest in disclosing information which allows the public to scrutinise its safety performance against its objective to operate as safe a railway as possible and protect members of the public from the harm that could be caused by accessing the railway.
47. Network Rail's view is that the public interest in these factors is already met in a number of different ways. Firstly, Network Rail is accountable to the rail safety regulator, the Office of Rail and Road. The ORR enforces compliance with Health and Safety at Work Act for Britain's

² https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

railways through inspection, audit and, where appropriate, investigation. The ORR sets rail-specific policy and produces guidance for the industry. In addition to reporting annually on rail safety, the ORR conducts investigations into safety related matters and publishes the findings on their website.

48. Network Rail also pointed out that incidents may additionally be subject to investigation by the Rail Accident Investigation Branch, who also publish their findings in rail safety digests for the purpose of improving rail safety. It also issues its own safety bulletins on a range of safety related incidents, and these are publicly available through its Safety Central website.
49. As statistics on rail safety, including fatalities on the network, are provided to, reported on and published by the ORR and RSSB, and safety bulletins are available through the website mentioned above, Network Rail considers that these existing publications meet the wider public interest in facilitating public scrutiny of its safety performance.
50. Network Rail agrees with the complainant that there is a public interest in the disclosure of details about fatalities on the railway network – however, its view is that this public interest is met by the official disclosure of statistics by the ORR and RSSB about all fatalities on the rail network, particularly as this reporting is specifically focused on identifying safety issues, trends and future actions.
51. Network Rail also agrees that there is undoubtedly grief for the families and those close to the people who have lost their lives in these incidents, and there is a genuine public interest in understanding the circumstances of these incidents where it is shown that actions could be taken to prevent a future death in similar circumstances. However, the latter aspect is formally dealt with by those organisations who hold Network Rail to account in these instances, the ORR (through their regulatory functions in respect of rail safety) and in certain circumstances the Rail Accident Investigation Branch. This public interest is also met by the Coroner's issuing of a Section 28 'Preventing Future Deaths' report when appropriate.
52. Network Rail does not agree with the complainant's assertions that "There is no therefore no downside to weigh against the public interest of making sure the statistics Network Rail have provided me are accurate". Network Rail's arguments as set out above demonstrated that it considers that disclosure in this case would be likely to cause distress to the families of those who have lost their lives, and risks influencing those amongst the public who may be vulnerable. Network Rail is of the view that there is a public interest in disclosure when this could protect members of the public from the harm that could be caused

by accessing the railway. In this respect, it has made the Commissioner aware of its work in suicide prevention and its work in schools to raise awareness of the dangers of the railway, also the "You vs. Train" and other campaigns specifically designed to educate young people on the risks of trespassing on the track.

53. Network Rail's view is that disclosure of the withheld information in this case would be likely to increase the risk of harm by causing unnecessary distress to the families of those who have lost their lives, and providing information which could increase attempts by individuals to access the railway, neither of which would be in the public interest.
54. Network Rail therefore concludes that the strongest public interest arguments in favour of maintaining the exemption-protecting the public from harm and maintaining safety - outweigh any public interest in disclosure, i.e. transparency and increasing public awareness, which it considers is already met by its publications, awareness raising and accountability to other organisations as set out above.

The Commissioner's position

55. The Commissioner has taken into account all of the arguments put forward by both the complainant and Network Rail. The Commissioner accords significant weight to transparency and accountability among public authorities and recognises that disclosure in this case would demonstrate transparency in a matter of great public concern. She also appreciates the importance of demonstrating that Network Rail is operating as safe a railway as possible and protecting members of the public from any harm that could be caused by accessing the railway.
56. All parties in this case are also aware that disclosure under the FOIA is not made to one individual applicant; once information is disclosed, it is accessible to anyone. In this case, if Network Rail were to disclose location and narrative information about each of the relevant electrocution fatalities, this would be an unrestricted public disclosure, accessible to everyone. Network Rail considers that references to specific locations are likely to cause vulnerable individuals to identify these locations as easily accessible places to take their own lives. If Network Rail were to make information of this type available under the FOIA, it would be directly contributing to the concerns already raised by authorities such as the Samaritans, who have issued guidance to avoid individuals putting themselves at risk in this way.
57. The Commissioner is aware that, while disclosure may be appropriate and in the public interest in some cases, there are occasions where disclosure of information held by a public authority may ultimately be more harmful than withholding it. Given the arguments made by

Network Rail, that maintaining the exemption is a matter of public safety, and that disclosure has the potential to cause great harm and/or distress to members of the public, the Commissioner considers that this may be an occasion where the public interest in maintaining the exemption may outweigh that in disclosing the withheld information.

58. The Commissioner is aware of Network Rail's responsibility to demonstrate the safety of its railways, its continuous improvement of this, and its further responsibility to protect the public from coming to potential harm and danger on its railways. The Commissioner considers that Network Rail has demonstrated that this public interest has been met by its accountability to named organisations and its publication of information and awareness-raising.
59. Having taken all arguments into account, the Commissioner has concluded that the public interest in maintaining the exemption outweighs that in disclosure of the withheld information in this case.

Other matters

60. The complainant has a personal interest in the safety of railways, which he has previously discussed with Network Rail. He also has concerns about the accuracy of some of the information which he has been provided by Network Rail. By way of advice and assistance, a member of staff at Network Rail has offered the complainant an extensive meeting at which he could discuss his concerns and questions. He has also been engaged in ongoing discussions with Network Rail about issues surrounding the reasons why he has requested the information. Whilst the Commissioner has made her decision regarding the withheld information, she would suggest that the complainant may benefit from such a meeting, which may go some way to answering his questions outside of the FOIA.

Right of appeal

61. 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@justice.gov.uk

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

62. 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.
63. 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

Deirdre Collins
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