



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2018/0234

**Heard at Fleetbank House
On 8 July 2019**

Before

**JUDGE HAZEL OLIVER
MR HENRY FITZHUGH
MR DAVID WILKINSON**

Between

TRANSPORT FOR LONDON

Appellant

and

INFORMATION COMMISSIONER

First respondent

and

NEIL HOOD

Second respondent

Appearances:

The appellant – Mr Christopher Knight, counsel
The Information Commissioner – Ms Elizabeth Kelsey, counsel
Neil Hood – in person

DECISION

The appeal is upheld.

SUBSTITUTED DECISION NOTICE

For the reasons set out below, Transport for London was entitled to withhold part of the information requested by Mr Hood on 6 October 2017 in reliance on the exemption in section 38 of the Freedom of Information Act 2000. The information that can be withheld is details of “person under a train” incidents shown by specific stations on the London Underground network between the requested dates.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 5 October 2018 (Decision Notice FS5073258, the “Decision Notice”) in which the Commissioner decided that certain information should be disclosed by the appellant Transport for London (“TFL”) under the Freedom of Information Act 2000 (“FOIA”). It concerns disclosure of information about “person under a train” (“PUT”) incidents on London Underground.

2. The TFL has records of “person on track” incidents, which are incidents involving unauthorised persons on London Underground tracks – including passengers falling on tracks and trespassing. PUT incidents are a subset of “person on track” incidents, where a person has been hit by a train. TFL wishes to withhold information about PUT incidents broken down by station (the “Disputed Information”).

3. On 6 October 2017 Mr Hood wrote to TFL and made the following request, which is the subject of this appeal:

“Could you please provide a tabular summary of the number of “Person on the track” incidents, previously known as “Person Under a Train” incidents, during the last 12 months which have occurred on London Underground?”

Please show results per Line and per Station, separated into fatal and non-fatal incidents, thank you.

If possible, could you also provide the dates these incidents occurred?”

4. TFL initially responded on 20 October 2017. It provided a table showing the number of incidents of people hit by trains for the financial year 2016/17. This showed the lines involved but not the stations. It did not specify whether the incident was fatal or non-fatal, giving the explanation that it was often not aware of the outcome of the incident. TFL now accepts that it does hold information on fatal/non-fatal at the time the individual leaves the network, and provided an updated version of this table shortly before this hearing. Mr Hood requested an internal review on 13 December. TFL replied on 29 January 2018. It provided data for the correct time period requested and referred to section 38 FOIA in the context of concern about the reporting of the specific locations of potential suicides.

5. Mr Hood made a complaint to the Commissioner on 16 March 2018. During the Commissioner’s investigation TFL provided all instances of “person on track” incidents broken down by date, line, station and fatal/non-fatal, but it continued to withhold details of PUT incidents split by individual stations. This is the Disputed Information.

6. The Commissioner decided that the section 38 exemption was not engaged, and so TFL should disclose the Disputed Information. She found that TFL had not demonstrated a causal link between the potential disclosure and a very significant and weighty chance of endangerment. In summary:

a. The level of information requested was low and there is generally more graphic detail available online.

- b. The withheld information is categorised as “Suicide or Illness/Accident, Suicide (Or Attempted)”, so does not necessarily reflect that it was a suicide.
- c. Providing the information via “What Do They Know” was not media reporting.
- d. There was not any significant risk relating to the identification of locations, as there are no bridges or level crossings, risk is reduced by CCTV coverage, and the underground network is not particularly easy to access.
- e. While noting Samaritans and World Health Organisation (“WHO”) guidance on reporting of suicides, the information requested is not specific to suicides.

The Appeal

7. TFL appealed against the Commissioner’s decision. The appeal is put on the basis that section 38 is engaged, and the public interest in upholding the exemption outweighs the public interest in disclosing the Disputed Information:

- a. The Commissioner has failed to respect guidance given by the Samaritans and WHO that publication of suicide locations causes an increase in suicides at those locations. She took account of irrelevant matters, and wrongly suggested the system is not easily accessible. The guidance is primarily aimed at media reporting, but disclosure under FOIA is to the world, and the rationale of the guidance applies to any publication of suicide locations.
- b. The Decision Notice fails to engage with all the various types of harm to different people that is caused by suicide attempts on the London Underground.
- c. The Decision Notice is not clear or consistent in its approach to the proper interpretation of section 38(1), in relation to the meaning of “endanger” and “would or would be likely to”.
- d. The Commissioner erred in characterising the Disputed Information as not concerning suicide attempts, as 90-95% of PUT incidents are properly so characterised.
- e. Disclosure would or would be likely to cause a focus by those vulnerable to suicide on specific stations and “copycat” attempts.
- f. There is an extremely strong public interest in suicide prevention, and little if any public interest in disclosure of the Disputed Information as TFL has met the public interest in understanding the overall rate of incidents across the network.

8. The Commissioner’s defends the appeal, and her response can be summarised as follows:

- a. The Commissioner accepts that the harms identified by TFL would constitute endangerment to the safety, physical or mental health of an individual. But the issue of whether endangerment would or would be likely to result from disclosure requires at least a “very significant and weighty chance” that “may very well” occur.
- b. TFL has not demonstrated that there is a very significant and weighty chance that suicide attempts would increase as a result of disclosure. PUT information includes incidents unrelated to suicide, and the statistics could be disclosed with an explanation that they encompass a variety of incidents. Disclosure of the data would not disclose

the specific location of any suicide attempts – only the station involved and the line, with London Underground stations being large and complex locations.

- c. PUT information broken down by station has been disclosed in the past, and the absence of evidence of harm arising from disclosure in the past is strong evidence that disclosure now would not give rise to a significant risk.

9. Mr Hood also provided a response. He complains of TFL's deliberate and constant avoidance of his simple request. He says this was a virtual duplicate of the question asked via the same website in 2009, which was comprehensively answered. His question is not about suicides. He asks how the public can be kept safe on the Tube if it is not aware of the dangers, and lists a number of high profile "person on the track" incidents which occurred in the year after asking his question, none of which were suicide attempts.

Applicable law

10. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) Any person making a request for information to a public authority is entitled—
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

.....
2 Effect of the exemptions in Part II.

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- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
 - (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

.....
38 Health and safety

- (1) Information is exempt information if its disclosure would or would be likely to -
 - (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual.

.....
58 Determination of appeals.

- (1) If on an appeal under section 57 the Tribunal considers—
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

11. Section 38 is a qualified exemption, meaning there is a duty to disclose unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

12. TFL and the Commissioner agree that the use of the word “endanger” rather than “prejudice” in section 38 is deliberate, and the two should not be elided. They also agree that “would” means “more likely than not”, and “would be likely to” means a “very significant and weighty chance” and something that “may very well” occur – a real risk alone is not sufficient. They both refer to the previous decision of the First-Tier Tribunal in ***Lownie v Information Commissioner & The National Archives & The Foreign and Commonwealth Office*** EA/2017/0087, which was based in part of an analysis of appellate decision in ***R(Lord) v Home Secretary*** [2003] EWHC 2073 (Admin). We agree with this analysis of the meaning of “would be likely to” in this context.

Issues for the hearing

13. The issues for the hearing were discussed with the parties and agreed as follows:

- a. Is the exemption in section 38 FOIA engaged by the Disputed Information? This turns on whether disclosure of the Disputed Information would or would be likely to endanger the physical or mental health of any individual or endanger the safety of any individual.
- b. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the Disputed Information?

Evidence

14. We had an agreed bundle of open documents consisting of the appeal, response from the Commissioner, response from Mr Hood, and supporting documents, all of which we have read. We had a witness statement from Mr Martin Bendrey, who was the Suicide Prevention Lead at TFL until May 2019, together with supporting documents. We also had a small closed bundle of documents consisting of the Disputed Information and a closed section from the statement of Mr Bendrey (with supporting documents). We had a second statement from Mr Bendrey provided shortly before the hearing which corrected some errors in his original statement, together with corrected versions of both open and closed information.

15. We heard evidence from Mr Bendrey in both open and closed session. We also heard submissions from all parties, and we address these submissions in our discussion and conclusions below. We have considered and taken all of this material into account in making our decision.

16. A summary of Mr Bendrey’s open evidence is as follows:

- a. TFL had put a lot of work into suicide prevention on the network. Mr Bendrey was Suicide Prevention Lead, with an initial remit of addressing the safety and disruption issues caused by suicides. This remit changed to focus more on preventing people from coming to the network in order to end their lives.

- b. Suicides on the London Underground network cause harm to the individuals attempting the suicide, their family and friends, onlookers and bystanders who witness attempts or try to prevent them, the train driver involved, and other TFL staff who may endanger themselves in attempting to prevent or respond to the incident.
- c. Mr Bendrey referred to guidance from both the Samaritans and the WHO which cautions against publishing too many details about suicides due to the risk of “copycat” behaviour. These inform TFL’s approach towards providing information about suicides.
- d. The Samaritans have published media guidelines for reporting suicides, which includes a factsheet on rail suicides. This specifically refers to the risk of encouraging “copycat” behaviour, saying there is substantial evidence that if too much detail is published regarding a method of suicide, vulnerable people may try to take their own lives using the same or similar methods. In relation to locations, it states *“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.”* It goes on to advise, *“Avoid identifying the exact location of a suicide, for example by naming or showing a railway bridge, piece of track or level crossing.”*
- e. The WHO has published “Preventing Suicide – a Resource for Media Professionals”. This also reports that media reporting of suicide can lead to imitative suicidal behaviours. In relation to reporting of locations, it states, *“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.”*
- f. Underground stations are not specifically referred to in the above guidance. Mr Bendrey’s evidence was that identifying the line and station where a PUT incident had occurred would provide an exact location within the context of this guidance, and is not materially different from identifying a bridge or piece of track. Any line will only operate on one or two platforms at each station, and the method of suicide is always jumping from the platform onto the track.
- g. Disclosure of the Disputed Information by TFL would be disclosure of statistics only, not details about specific suicides, and TFL is not a media organisation. But, TFL’s concern is that this data could be used to create a “league table” which could be circulated or used by vulnerable persons. Mr Bendrey explained that information was already available online which provided advice about different methods of suicide, e.g. the most successful and least painful methods. Rail infrastructure is up there as one of the most lethal and accessible methods, and the removal of other options (such as easy overdoses, and use of gas ovens or vehicle emissions) has had an impact on viable suicide options. Once disclosed, TFL would have no control over how the

statistics would be used. FOIA responses from TFL regularly generate significant comment and interest on social media. He also referred to an example of suicide reporting involving a named station which was followed by further incidents – discussed further in closed session.

- h. Some 95% of PUT incidents for the period covered by the request were suicides. There are some other PUT incidents that do not involve suicide (e.g. trespassers, accidents or people trying to recover property from the track). TFL conducted research with a focus group of customers which indicated that the public assumed all announcements about a “person on the track” or “person under a train” related to fatal suicides.
- i. TFL did provide equivalent information in response to another request from Mr Hood in 2009, including individual stations, which remains in the public domain. TFL’s approach to suicide prevention has changed since then, and this is why they no longer release information about individual stations. Mr Bendrey’s statement sets out statistics which indicate that there has been an increase in the number of suicides since 2009, and that they have been concentrated on a narrower pool of stations. He accepts that this cannot be specifically linked to the 2009 disclosure.
- j. Mr Hood asked Mr Bendrey about Samaritans “talk to us” signage on the platforms at some London Underground stations, which he said could create the impression of suicide hotspots. Mr Bendrey explained that these signs were, at more stations than not, at the tail end of platforms where most suicide attempts happened. They were already in place before his work on suicide prevention, and his focus was on not wanting individuals to know about suicide locations before they got to that moment.

17. We also saw a letter provided by Mr Ian Stevens, Network Rail’s Programme Manager for Suicide Prevention. This refers to the concern that highlighting a particular method of suicide or location may lead to copycat events, and that this is why the rail industry seeks to limit the detail it provides about any fatality on the network. He explains various reasons why the general population considers all fatalities on the railway to be suicides, unless there has been a notable train accident. He goes on to say, *“Because it is so difficult for the public to make the distinction between a suicide and an accidental fatality and taking into consideration the mythology that builds up around them, voluntarily sharing any information with third parties about the location of such becomes fraught with danger when considering the copycat scenario...It is unlikely for example that someone contemplating death by suicide on the railway will research whether an individual at a specific location took their own life there or whether the event was accidental. The overriding message will be that the location is a viable one at which to end life and the means (a train) is an effective mechanism by which to do that.”*

18. We also had a letter from Mr Simon Fuller, Information Governance Manager at British Transport Police (“BTP”), which explains BTP’s approach to section 38 and suicidal incidents, including the risk of suicide contagion from public disclosure about methods or locations of suicide. BTP also draws heavily on the Samaritans guidance.

19. The gist of Mr Bendrey’s evidence and submission made in closed session is as follows:

- a. The witness was asked questions about the Disputed Information. These included questions about what the data may show about “hotspot” locations.

- b. The witness explained that in his view, and information about location should not be disclosed, regardless of the number of PUT incidents that had occurred.
- c. The witness was asked questions about the example referred to at paragraph 39 of his open witness statement, incidents at a named station. The witness accepted that none of the incidents could definitely be linked to reporting of PUT incidents.
- d. In submissions, Mr Knight drew the Tribunal's attention to the minority of stations at which there was more than one PUT incident.

Discussion and Conclusions

20. Is the exemption in section 38 FOIA engaged by the Disputed Information? We find that section 38 is engaged, for the following reasons.

21. It is clear that suicides on the London Underground cause considerable harm. There is death or serious injury for the individual involved, and severe distress for friends and family. Harm is caused to bystanders, who will be caused mental distress by witnessing the incident, and may endanger themselves in trying to stop the attempt. Similarly, TFL employees may endanger themselves in trying to stop the attempt, and will be caused mental distress when responding to the incident. The driver of a train involved in a suicide incident will experience serious distress and potentially long-lasting psychological injury. All of these effects would clearly fall within the concepts of endangering physical or mental health and the safety of any individual, as set out in section 38.

22. The question in this case is the extent to which disclosure of the Disputed Information is likely to cause suicide attempts on the London Underground, and so endanger health and safety in the ways set out in the preceding paragraph. Having considered the matter carefully, we find that TFL have provided us with sufficient evidence to meet this test.

23. Firstly, we accept that the so-called "copycat effect" exists, in that public reporting of details about suicides may cause vulnerable individuals to attempt the same method of suicide at the same location. This is the basis for the guidance from both the Samaritans and the WHO on reporting of suicides, and is supported by the evidence from Mr Stevens on network rail suicides.

24. Both the Commissioner and Mr Hood made the point that this guidance is directed at media reporting, and the concern is about sensationalist reporting and creation of "hotspots". Release of factual statistics is very different. We agree that release of the Disputed Information by TFL is not the same as media publication of details about a specific suicide. However, we also accept that the effect may be similar. Although the information requested is simply a set of statistics, release under FOIA is publication to the world at large. We accept Mr Bendrey's evidence that this could be used to create a "menu" or "league table" list of locations used for suicide. We have taken into account the fact that there is already information on the internet which advises on different methods of suicide. There is also the likelihood of an increased focus on use of railways and the London Underground as other methods of suicide have become more difficult. We have also seen the Disputed Information, and note that this does show a minority of stations with more than one PUT incident (as noted in the gist of the closed session set out above), which could cause vulnerable people to focus on these locations.

25. In questioning of Mr Bendrey, the Commissioner made the point that information about a London Underground station is not information about a specific platform location. We accept Mr Bendrey's evidence that information about both line and station would generally narrow the location down to one or two platforms, and no further location information would be needed as the method of suicide is invariably jumping onto the track from the platform.

26. The same information as that in dispute was released by TFL in 2009. We accept Mr Bendrey's explanation as to why TFL's policy has changed, in light of the work done since then on suicide prevention. The statistics given in Mr Bendrey's statement are consistent with an increase in suicides caused by release of the information in 2009. However, as submitted by the Commissioner and accepted by Mr Bendrey, they do not show an actual causal link – there could be other explanations for the increase in suicides and in clustering at particular stations. Similarly, the evidence about the named station is consistent with copycat incidents, but there is no actual evidence that further incidents were caused by press reporting of this location. Neither the statistics since 2009 nor the evidence about the named station are direct evidence of copycat incidents caused by publication of suicide location details. But, they are consistent with the concerns of TFL about the risk of copycat incidents.

27. The Commissioner submits that the Disputed Information shows PUT incidents, not suicides. Some of these incidents take place for other reasons. Mr Hood has also pointed to a list of incidents which took place in the year since his request for other reasons such as assault, accidents and trespass. It is correct that PUT statistics are not equivalent to suicide statistics. However, 95% of the PUT incidents for the period requested were suicides. We also accept Mr Bendrey's evidence that the public understanding of a PUT is a suicide, which is based on customer research. This is supported by the evidence from Mr Stevens of Network Rail about the public perception of railway fatalities. This means that release of the information would be interpreted by much of the public as suicide statistics, and as showing the station location of those suicides.

28. The Commissioner suggested that the information could be disclosed with an explanation that these statistics cover a variety of different types of incidents, with no percentage breakdown. Mr Bendrey's evidence was that he was concerned this would give a misleading impression that the network was unsafe, particularly if a description was given of all the different types of incident. We find that it would clearly be misleading to give a description of the different incidents without mentioning suicide, and would also be misleading to simply list all types of incident in circumstances where 95% are suicides. We also note the evidence from Mr Stevens, that someone contemplating suicide will not necessarily research the actual cause of a railway fatality, and will simply focus on the overriding message that the location is a viable one at which to end life.

29. Having taken all of the above into account, we find that the evidence does meet the threshold of showing that disclosure of the Disputed Information would or would be likely to endanger the physical or mental health of any individual or endanger the safety of any individual. We do not find that it "would" endanger health or safety, as we do not find it is more likely than not. However, we find that the evidence meets the lower threshold of being "likely" to endanger health or safety. The Commissioner submitted that there was not sufficient evidence to meet the requirements of section 38, but we disagree. We find that there is a very significant and weighty chance that one or more suicide attempts may very well occur as a result of the disclosure of the Disputed Information. In summary - there is clear guidance from the Samaritans and WHO which links copycat suicides to the reporting of railway suicide locations;

this is supported by evidence from Network Rail and the British Transport Police; PUT incidents are generally understood by the public to represent suicides; the information about PUT incidents would be published to the world at large; there is already various advice on in the internet about different methods of suicide; and the information is very likely to be republished in various forms on the internet so it can be used by vulnerable people who are considering ending their lives.

30. Does the public interest in maintaining the exemption outweigh the public interest in disclosing the Disputed Information? We find that the public interest in maintaining the exemption does outweigh the public interest in disclosing the Disputed Information.

31. There is some public interest in disclosure of the Disputed Information. There is a general interest in transparency. There is also a public interest in the understanding of suicides and why they occur - although this is likely to be served better by limited disclosure for the purposes of academic research. Mr Hood also referred in his opening remarks to understaffing at some stations and his concerns about a rise in suicides (although Mr Bendrey was not questioned about this), and there is potentially a public interest in understanding whether understaffing has led to an increase in suicides at particular locations.

32. However, we find that these interests are clearly outweighed by significant harms caused by the risk of an increase in suicide attempts. The serious health and safety harms caused by suicides on the London Underground are set out in paragraph 21 above. In addition, such incidents cause considerable disruption to the travelling public, and disrupt the ability of TFL to run its network effectively. TFL has provided the information requested to the level of individual line, and it is not clear how further disclosure of individual stations is required to serve any significant public interest. The Commissioner also accepts that the public interest in disclosure is outweighed in this case.

33. Mr Hood also complains about the way in which TFL dealt with his request. He complains that section 38 was not mentioned initially, and about the information that was provided to him. Section 38 was not mentioned in TFL's initial response to the request, although the underlying reason (Samaritans guidance on the reporting of suicides) was explained. We have accepted the reasons why TFL dealt with this request differently as compared to the request made in 2009. TFL did initially provide information based on incorrect dates. There was some confusion during the Commissioner's investigation, which resulted in Mr Hood being sent a full set of "person on track" data which was not what he had intended to ask for. There were also some inaccuracies in Mr Bendrey's original statement, which resulted in a revised statement and corrected data being provided shortly before the hearing. We do not find that these errors were deliberate, but it would have been more helpful if TFL had been clear in its initial response about which exemption was relied on, and had taken more care to provide accurate information from the outset.

34. For the reasons given above, we uphold the appeal and substitute the decision notice set out at the start of this decision.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 31 July 2019 Promulgation date: 1 August 2019