

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 May 2017

Public Authority: Health and Safety Executive (HSE)
Address: Redgrave Court
Merton Road
Bootle
L20 7HS

Decision (including any steps ordered)

1. The complainant made a request for the HSE's report on the accident at the Smiler rollercoaster, Alton Towers. The HSE provided the complainant with the report but made redactions under section 40(2) FOIA.
2. The Commissioner's decision is that the HSE has correctly applied section 40(2) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 27 September 2016 the complainant made the following request for information under the FOIA for:

"I would like a copy of the HSE investigation report into the Smiler crash at Alton Towers.

Previously you have declined to supply it because to do so might impede the prosecution.

However, it appears that the report has now been submitted as evidence to the court, and at least some journalists have a copy:

<https://www.theguardian.com/travel/2016/...>

and the sentencing is today.

So I think you can probably release the report now ? To be honest, I'm rather surprised that it's not on your press page!"

5. The HSE responded and refused to disclose the requested information under section 31(1) FOIA.
6. The complainant requested an internal review as the report had been published with redactions. The complainant asked the HSE to label the redactions made to Alton Tower's staff names to clarify which redacted names referred to the same individuals. The HSE sent the outcome of its internal review on 25 October 2016. It upheld the redactions made to the report under section 40(2) FOIA and confirmed that it was unable to label the redactions under this exemption.
7. My investigation will look at whether the HSE is correct when it says it is entitled to rely on section 40(2) FOIA to make redactions to the published report.

Scope of the case

8. The complainant contacted the Commissioner on 30 November 2016 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the HSE was correct to apply section 40(2) FOIA in this case.

Reasons for decision

10. Section 40(2) FOIA provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3)(a)(ii) is satisfied.
11. One of the conditions, listed in section 40(3)(a)(ii), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.

12. The Commissioner has first considered whether the withheld information would constitute the personal data of third parties.
13. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
14. In this instance the HSE has explained that the withheld information includes the address of the author of the report, the names of Alton Tower's staff and direct quotes from their witness statements.
15. The Commissioner does consider that this is information from which the data subjects would be identifiable and therefore does constitute personal data.
16. The complainant has asked the HSE to label the redacted names (with for example numbers) so that he can identify which redacted names refer to the same individuals.
17. The HSE has refused to take this action as it considers that this would enable individuals to be identified because of information that was made available during the court case. It referred to the Commissioner's Guidance on determining what is personal data¹, which states that:

"When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies."
18. The Commissioner considers that due to the widespread media interest in this incident and due to information that was released within the context of the court case, to label the redactions made to the names

¹ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

(with for example numbers) could enable those individuals to be identified by a 'determined person' and therefore this would constitute personal data.

19. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has initially considered whether the disclosure would be fair.
20. In relation to the address of the report's author, the HSE has explained that it is unable to state for a fact if the postal address relates to the author's business or private address. However it said that as many consultants work from home, it erred on the side of caution in making this redaction. It also confirmed that there is no legitimate public interest in the disclosure of the author's address.
21. In relation to the redactions to the names of Alton Tower's employees (labelled or otherwise) and the quotes from their witness statements, it explained that the data subjects were acting in their official capacities. However it went on to say that one part of the HSE's statutory role is to investigate workplace incidents, gathering information as part of the investigation process such as witness statements, to establish if there has been a breach of health and safety legislation. It said that HSE considers a witness statement to be the personal data of the individual who provided a statement and that such information is provided to HSE in circumstances which imply an expectation that the information will only be used for the purposes of the investigation and would otherwise remain confidential. It therefore argued that witnesses would have a reasonable expectation that their names and witness statements (which contain their opinions) would not be disclosed into the public domain. It said that this reasonable expectation is further supported by the fact that none of the individuals detailed within the report were charged with breaching health and safety legislation. Finally it also argued that disclosure of this information may result in damage and distress being caused to the data subjects. It summarised again that it does not consider that there is a legitimate public interest in disclosure of this information as none of the individuals detailed within the report were charged with breaching health and safety legislation.
22. Based upon the HSE's cautious assumption, the Commissioner considers that the author of the report would not expect his home address to be disclosed into the public domain.
23. In relation to the redacted names and witness statements, the Commissioner again accepts that individuals would have a reasonable

expectation that this information would not be disclosed into the public domain, particularly as none were charged with any offence under health and safety legislation. The Commissioner also considers that considering the media interest in this incident and the serious consequences of the accident, it is highly likely that if the names (labelled or otherwise) and witness statements were disclosed this would cause substantial damage and distress to the data subjects.

24. The Commissioner has therefore gone on to consider whether any of the Schedule 2 conditions can be met, in particular whether there is a legitimate public interest in disclosure which would outweigh the rights of the data subject set out above by the HSE.
25. The Commissioner does not consider that there is a legitimate public interest in disclosure of the address of the author of the report, the author is named in the report and providing the address would provide no greater understanding to the public. In relation to the names and witness statements, the Commissioner considers that there is a wider public interest in transparency surrounding such a serious incident. However the majority of the report has been disclosed with limited redactions under section 40(2) FOIA and the information disclosed is extremely meaningful and gives the public a detailed understanding of how the incident occurred.
26. After considering the nature of the withheld information, the reasonable expectation of the data subjects, the damage and distress that is highly likely to be caused and the fact that none of the individuals detailed within the report were charged with breaching health and safety legislation, the Commissioner believes that disclosure under FOIA would be unfair and in breach of the first principle of the DPA and that any legitimate public interest would not outweigh the rights of the data subjects in this case.
27. Therefore the Commissioner's decision is that section 40(2) FOIA is engaged and provides an exemption from disclosure of the redacted information.

Right of appeal

28. 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

29. 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.
30. 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

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF