

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2020

Public Authority: South Kesteven District Council
Address: St Peter's Hill
Grantham
Lincolnshire
NG31 6PZ

Decision (including any steps ordered)

1. The complainant has requested information about a risk assessment at a site for a particular event from South Kesteven District Council (SKDC). SKDC provided some information but withheld the actual risk assessment, citing section 38(1)(Health and safety) of the FOIA.
2. The Commissioner's decision is that section 38(1) is not engaged. She requires SKDC to take the following steps to ensure compliance with the legislation:
 - disclose the requested risk assessment.
3. SKDC must take these steps 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 3 February 2020, the complainant wrote to SKDC and requested information in the following terms:

"On the 26 December 2019 an event was held Public Open Space at Riverside Paddocks, Grantham. SKDC as owners of Riverside Paddocks have a responsibility under the Occupiers Liability Act 1957. They have common duty of care to ALL visitors to take "such care as in all circumstances of the case is reasonable to see that the

visitor will be reasonably safe in using the premises for the purposes for which the invited or permitted by the occupier to be there". The duty is to prevent injury to visitors.

The site is attended by many vulnerable people, children, pushchairs & mobility scooters, not everyone in the park were attending the event. The area is a PUBLIC Park. The site is used by around 30 larger horses (unknown rider abilities) and 20 hounds (capable of harming people). The control measures in Place for the horses amounted to a warning tape strung between a few fences. The dogs were enclosed but were regularly handled by the public.

No warning signs were posted for the general public to be aware that this event was taking place and obvious dangers from these animals. Many people use this park as a short cut from the elderly development at Riverside to the Supermarket.

The public have a right to know these risks have been assessed and suitable control measures need to be enforced by the owner of the land - SKDC, to protect the public at large.

1/ Confirm a SITE SPECIFIC RISK ASSESSMENT has been undertaken by a suitably qualified person. This relates to the SITE, ground conditions, location,- NOT the event. Please confirm this takes into account how emergency services will access the site

2/ Provide a copy of the SITE SPECIFIC RISK ASSESSMENT- undertaken by SKDC before approval of the event, please include copies for the 2018 & 2019 event. Including all access for emergency services.

3/Provide a copy of the EVENT RISK ASSESSMENT FOR 2019

4/ Confirm SKDC's responsibility under the Occupiers Liability Act for this event held on Boxing Day".

5. SKDC responded on 19 February 2020. It gave a response to parts (1), (2) and (4) of the request, explaining that the site was inspected by SKDC officers in advance of the event, and on the morning of the event, to conduct a visual assessment of the risk; it advised that no recorded site specific risk assessment was completed. In respect of part (4) of the request it explained:

"SKDC have a common duty of care under the Occupiers Liability Act. We are satisfied that we have fulfilled this duty. As part of the event application a risk assessment was conducted by Belvoir Hunt, this went before the Safety Advisory Group (SAG). SAG agreed the risk assessment for the event, and this was confirmed to SKDC. In

addition to this SKDC officers carried out visual inspections of the site both prior to the event and on the morning of the event”.

6. It refused to provide the assessment at part (3) of the request, citing section 38(1) of the FOIA.
7. On 19 February 2020, the complainant requested an internal review. He disputed that SKDC could withhold the assessment referred to at part (3) of his request.
8. Following an internal review, SKDC wrote to the complainant on 27 May 2020. It maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 2 June 2020 to complain about the way his request for information had been handled. He raised the following concerns:

“My issue is that SKDC released the Risk Assessment [RA] for the 2018 event without claiming any exemptions or exceptions. I passed constructive comments both to SKDC and the Safety Advisory Group regarding the event and compliance with the submitted risk assessment from 2018.

Therefore, when I asked for a copy of the 2019 risk assessment, they have for some reason instigated Section 38. The protest at the event was peaceful and this was confirmed by the Police Officer in charge. It doesn't make any sense to release 2018 and not the 2019 RA because the precedent had been set”.

And:

“The basis for my challenge was that safety of ALL the Public using the park should be the primary concern not the event. I need the risk assessment to explain the errors apparent from the event ... SKDC had previously provided the risk assessment from 2018 event under an FOI request, they did this without any reviews or exemptions. One of the issues raised by SKDC is possible sabotage. I can refute that because I HAD the 2018 risk assessment before the 2019 event. I waited until the 2019 event had taken place before asking for the risk assessment so how could it cause an issue to an event that had already been staged? The risk assessment will need re-visiting and checking each year, they will not be the same. In 2018 the Horses, Hounds & vehicles were off-loaded in Grantham College. In 2019 the Belvoir Hunt used an NHS

Car Park ... the risk assessment will or should be different – that appears to be the issue.

... I had discussed the 2018 event with senior members of SKDC & LCC. I explained the safety issues and that the 2018 risk assessment was not being followed by the event organisers. ALL the Councils Thanked me for my input. All everyone wanted was a safe environment for everyone who used the park. The event organisers used NHS Private Property to off-load the horses & hounds for the event ... NHS Property ... confirmed no-one had authorised use of their car-parks. I therefore feel on Public Interest grounds this needs to be scrutinised against the 2019 risk assessment regarding the trespass”.

10. In order to resolve his complaint, the complainant advised the Commissioner that he wished SKDC to undertake the following:

“Provide the 2019 Risk Assessment

Explain why they have not provided a SITE SPECIFIC RISK ASSESSMENT FOR THE PARK

APOLOGISE for the refusing. I have risk assessments for many events like this and to suggest I would cause harm or distress is totally incorrect and my reputation [sic].

Assist to ensure that the PUBLIC PARK is safe for everyone by agreeing to discuss the issues honestly”.

11. The Commissioner cannot require a public authority to apologise. Nor can she require SKDC to provide explanations or '*discuss the issues honestly*'.
12. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
13. The Commissioner will consider the citing of section 38 of the FOIA to withhold the assessment at part (3) of the request. She has viewed the withheld information, which is a 'template' type form that the hunt organisers have completed prior to it being passed for approval by the Safety Advisory Group.

Reasons for decision

Section 38 – Health and safety

14. SKDC has cited both sections 38(1)(a) and (b) of the FOIA to withhold the information. Sections 38(1)(a) and (b) state that information is exempt 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”.*

15. For the exemption to be engaged, it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
16. The Commissioner considers that the term ‘endanger’ in section 38(1) should be interpreted in the same way as the term ‘prejudice’ in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment, and the likelihood of it occurring as a result of disclosure of the information in question, is *“real, actual and of substance”*, rather than trivial or insignificant. As part of this, she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
17. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that it is envisaged would, or would be likely to occur, should relate to the applicable interest described in the exemption. Second, there must be a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there must be a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure ‘would be likely’ to result in endangerment or that disclosure ‘would’ result in endangerment - ‘would’ imposing a stronger evidential burden than the lower threshold of ‘would be likely’.
18. The relevant applicable interests described in this exemption are physical or mental health (section 38(1)(a)) and the safety of any individual (section 38(1)(b)), both of which have been cited by SKDC.

19. The Commissioner's guidance¹ sets out that under section 38(1)(a), endangering physical health usually means an adverse physical impact, and often involves medical matters. This can relate to individuals or to groups.
20. Her guidance also states that endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it has a greater impact than stress or worry. A public authority may find it difficult to demonstrate a danger to mental health. It might consider obtaining an expert opinion confirming that the disclosure of the information would be likely to endanger the mental health of the applicant or any other individual; however, the Commissioner considers that clinical evidence of a psychiatric condition is not always necessary.
21. Endangering safety (section 38(1)(b)) is usually connected to the risk of accident and the protection of individuals. Information that could endanger an individual's safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied upon.

Is section 38 engaged?

22. In order to engage the section 38 exemption, a public authority must be able to evidence a causal relationship between the potential disclosure and the identified endangerment.
23. In the case under consideration here, SKDC considered that both subsections 38(1)(a) and 38(1)(b) applied. In that respect, it told the complainant it considered that: "*to publicise an event's safety or security issues could compromise safety in future similar events*".
24. In its internal review, SKDC further explained that:

"The nature of the prejudice is that disclosure of the Belvoir Hunt event risk assessment could endanger the physical or mental health of individuals. The consequences of disclosing the risk assessment is that it could be publicised widely and be used to undermine the ability of the organisers and managers of the event to maintain the security and integrity of the event.

To release the risk assessment would provide the public with details of perceived risks and controls to mitigate those risk. The risks and mitigations can be used by individuals to disrupt, sabotage or

¹ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

increase the likelihood of incidents during the event, which would endanger the physical and/or mental health of those organising and working at the event and those in attendance.

In determining if the prejudice would or would likely occur we have considered the circumstances that could occur, frequency of the opportunity for prejudice to arise and the likely result. The risk assessment contains controls to mitigate risks, if these are known for current or future events the information can be used by member of the public to bypass the controls and cause harm to individuals present. The opportunity for this to happen is frequently throughout the event. The event historically takes place each year on 26 December with large numbers of people in attendance. The likely result is harm to the physical and/or mental health of individuals in attendance and those working and participating in the event”.

25. As is her practice in a case such as this, and given that SKDC considered that both limbs of the exemption applied, the Commissioner asked it to explain why disclosure of the information would, or would be likely to, endanger the health or safety of an individual. It reiterated the arguments which it had stated to the complainant above.
26. The Commissioner is satisfied that the prejudice SKDC is envisaging in this case is relevant to the particular interests which sections 38(1)(a) and (b) are designed to protect, as the exemptions provided by sections 38(1)(a) and (b) very obviously serve to protect individuals' health and safety. Accordingly, the first limb of the three part test outlined above (ie applicable interests) is met.
27. The Commissioner has gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by SKDC. In her guidance on the prejudice test, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice 'would' or 'would be likely' to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.
28. Although invited to do so, SKDC did not confirm the level of likelihood being relied on. The Commissioner has therefore considered the lower level of likelihood, ie disclosure 'would be likely to' endanger the physical or mental health / health and safety of any individual.
29. The Commissioner initially notes that no individuals are named or targeted within the withheld information, rather the assessment and arguments provided all generally relate to members of the public and

event organisers. She also notes that the event takes place annually and each year requires a new risk assessment, which may obviously change depending on the circumstances at the time and the exact location where it will be held.

30. The Commissioner has been advised that the complainant was provided with the risk assessment for the 2018 event (via FOIA disclosure) prior to it happening and this request, for the 2019 event, was not requested until after the event had taken place. No evidence has been provided which would suggest that the previous early release of the risk assessment prior to the 2018 event caused any harm to any party – nor has SKDC suggested that this was a concern.
31. In its arguments above, SKDC considers that disclosure could undermine the ability of organisers and event managers to maintain security, although it does not explain how this would occur. Furthermore, it has previously disclosed the 2018 risk assessment *prior* to the event rather than subsequent (as would be the case here), which considerably weakens its rationale. SKDC also refers to disclosure allowing individuals to disrupt or sabotage the event, although it doesn't explain how this could be achieved – especially after it has taken place.
32. The actual content of the assessment is minimal, with very little of the type of operational detail or intelligence which the Commissioner considers would be likely to contribute to the concerns raised by SKDC. Furthermore, were there a perceived increase to any risk of incidents occurring in the future, then any future risk assessment could reflect this, with appropriate safeguards being taken.
33. Having considered the arguments put forward by SKDC, alongside the withheld information itself, the Commissioner is not satisfied that it has demonstrated a causal link between the potential disclosure and endangerment; she has considered this at the lower level of 'would be likely to' occur. It follows that she does not find the exemption engaged.
34. As the exemptions at sections 38(1)(a) and (b) are not engaged, SKDC must follow the step at paragraph 2 of this notice.

Right of appeal

35. 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

36. 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.
37. 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

Carolyn Howes
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