

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2019

Public Authority: Devon and Somerset Fire and Rescue Service

Address: The Knowle
Clyst St George
Exeter
EX3 0NW

Decision (including any steps ordered)

1. The complainant has requested records of a fire from Devon and Somerset Fire and Rescue Service (DSFRS). DSFRS provided some information but withheld the remainder, citing sections 40(2) (personal information), 31(1) (investigations and proceedings) and 36(2)(b)(ii) (prejudice to effective conduct of public affairs) of the FOIA. During the Commissioner's investigation it withdrew reliance on section 31(1) instead relying on section 36(2)(c) of the FOIA. The complainant also disputed that the information he had been provided with was accurate and complete.
2. The Commissioner's decision is that DSFRS has correctly applied the provisions of sections 36(2)(b)(ii) and 36(2)(c) of the FOIA and she finds that the public interest favours maintaining these exemptions. She also finds that DSFRS was entitled to rely on section 40(2) (personal information) of the FOIA and that it has complied with section 1 of the FOIA. No steps are required.

Background

3. Some background information about the fire can be found on DSFRS's website^{1,2}.

Request and response

4. On 7 September 2018, the complainant, who describes himself as having been in the fire and safety profession for over 50 years and who has written several articles about this fire, wrote to DSFRS and requested information in the following terms:

"Cathedral Yard Fire 28th October 2016 - Copies of Records

Please could you provide copies of the following documents:

- 1. The fire ground incident log*
 - 2. The fire control incident log (in relation to this incident)*
 - 3. Witness statements or notes taken by the officers who compiled the report.*
 - 4. Relevant information from Incident, Operations and Sector Commanders.*
 - 5. Your Document Retention Policy".*
5. DSFRS acknowledged the request on the same day. On 27 September 2018, DSFRS requested clarification of the first four parts of the request, which the complainant provided on 1 October 2018, as follows:

"My answers:

- 1. This will be the hand written or digital log that is compiled at the fire ground at the incident command vehicle.*
- 2. This will be the digital electronic incident log compiled at fire control that records every message sent to them, appliance mobilisation and every other related action in respect of this incident.*

¹<https://www.dsfire.gov.uk/News/Newsdesk/TheExeterFire.cfm?siteCategoryId=3&T1ID=26&T2ID=424>

² <https://www.dsfire.gov.uk/News/Newsdesk/documents/CathedralYardReport.pdf>

3. *This relates to the official report relating to the Cathedral Yard Fire issued by Devon and Somerset Fire and Rescue Service.*
4. *This refers to information and witness statements of personnel and fire officers who were interviewed as part of the fire investigation".*
6. On 19 October 2018, DSFRS wrote to the complainant to apologise for the delay in responding. It wrote again on 1 November 2018, providing reasons for the delay.
7. Following further correspondence, on 28 November 2018, the complainant requested an internal review of the handing of his request. DSFRS acknowledged the request and advised him that one would be provided after a response had been sent.
8. On 13 December 2018, DSFRS wrote again, apologising for the delay and, at the same time, provided a response in respect of part (5) of the request.
9. On 16 January 2019, the complainant chased a response to both his substantive request and his request for internal review.
10. On 17 April 2019, DSFRS responded, apologising for the delay and referring to legal advice being sought regarding the request.
11. On 1 May 2019, DSFRS responded to part (1) of the request. It disclosed some information but redacted personal data, citing section 40(2) of the FOIA. On the same day, the complainant sought confirmation that this was an exact transcript of what had been written. He was advised that the person dealing with it believed it was and he sought verification of this.
12. On 13 May 2019, DSFRS again apologised for the delay.
13. On 17 May 2019, DSFRS disclosed some information in respect of part (2) of the request. Redactions had been made under sections 40(2) and 31(1) of the FOIA.
14. On 30 May 2019, DSFRS wrote to the complainant citing section 36 of the FOIA in respect of parts (3) and (4) of the request, providing its public interest considerations later, on 3 June 2019.
15. On 25 July 2019, DSFRS provided a further response in respect of the "Fire Control timeline" (part (1) of the request). DSFRS said this was ready for disclosure but that it required a postal address, as it was too large to provide electronically. It was posted to the complainant on 26 July 2019.

16. On 17 September 2019, DSFRS provided a further response in respect of the "Fire Control Incident Log" (part (2) of the request). This included some redactions in respect of sections 40(2) and 31(1).
17. During the Commissioner's investigation, DSFRS withdrew reliance on section 31(1) of the FOIA, advising that it considered that section 36(2)(c) should have been cited in respect of any information withheld under this exemption. Following the combined cases of the *Home Office v Information Commissioner (GIA/2098/2010)* and *DEFRA v Information Commissioner (GIA/1694/2010)* in the Upper Tribunal, a public authority is able to claim a new exemption either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
18. DSFRS further advised that, after reconsideration, names of senior staff at the rank of Area Manager or above would be disclosed, which the Commissioner understands has since been done. Further information was also disclosed from within the Fire Control Incident Log.
19. In view of the considerable delays already experienced, the Commissioner has used her discretion and has investigated the case in the absence of an internal review.

Scope of the case

20. The complainant initially contacted the Commissioner on 25 March 2019 to complain about the lack of response to his request. The Commissioner wrote to DSFRS asking it to respond within 10 working days and advised the complainant to let her know if it failed to do so.
21. Following a partial response, the complainant wrote to the Commissioner on 29 May 2019, querying the number of redactions made. Following further correspondence with DSFRS, he submitted additional grounds of complaint to the Commissioner on 4 June 2019.
22. In respect of part (1) of his request, the complainant has advised:

"On 1st May 2019 I received a typed copy of the Fire Ground Event and Decision Log (Item 1 of my initial request) that was heavily redacted and not the original document that I believe would have been hand written".
23. In respect of part (2) of his request he added:

"On 17th May I received a copy of the Fire Control Incident Log (Item 2 of my initial request) that was heavily redacted and has 3 periods where very little appears to have happened 09.50 to 10.47, 11.04 to 11.20 and 11.27 to 11.48.

At this crucial time, I do not believe there were no messages passed between the fireground, agencies and fire control. I believe that the amount of information that has been redacted is far more than should have been..."

24. He also raised the following concerns regarding the information that had been disclosed to him:

"None of the documents provided appear to be full copies of the original records requested. Instead they appear to be newly created records using some, but not all the original data. I am advised that the latest document, purporting to be the fire control incident log, appears to be from their management information system with much of the information not being the same as in previous reports.

Although the information originates from the fire control log, the data exported is selected. Missing for example are details of the number of firefighters on each vehicle, something that would be recorded on the fire control log when confirmed by the crew as they leave the fire station. The size of the document may give the impression of being the full log, but that is because it also includes a substantial amount of background system information that would not usually be shown on the fire control incident log.

I have now shown the first 80 pages of the latest log to ex fire service colleagues, including fire control staff and they all agree that this document is extremely difficult to understand, contains a lot of useless information and has most of the important information redacted".

25. He raised a further concern about DSFRS inviting in a subject expert to assist with its handling of the request. He advised the Commissioner that this former employee, who was someone who was involved with the management of the incident and therefore any failures, was:

"... going to influence what information was released. Potentially, this may have been to alter records, by adding information that should have been recorded at the time or amending and removing information that might expose failings".

26. The complainant also invited the Commissioner to view a BBC programme, advising:

"As you will have seen in the BBC Inside Out programme I referred to in my previous submission one of the Sector Commanders has stated that some of his actions were not included in the Official Report and the plan of the Royal Clarence Hotel that he marked up appears to have disappeared – he also outlined some of the

mistakes that he felt had been made DSFRS [sic] and I believe this is why they are trying to prevent access to the official documents”.

(The Commissioner here notes that she has not viewed the programme, or any other video footage which the complainant has suggested she should view, as she does not consider it necessary (or appropriate) for her to do so in order to reach a decision in this case).

27. The complainant has also raised issues with what he considers to be anomalies between the data he has been provided with and other information he has obtained, either directly from fire staff or from other external sources. The Commissioner is unable to comment on such discrepancies.
28. The Commissioner will consider the following below:
 - Part 1 – whether the information provided is the full original document (or an accurate copy of it) and the citing of section 40(2) to withhold some information.
 - Part 2 – whether the information provided is the full original document (or an accurate copy of it) and the citing of sections 40(2) and 36 to withhold some information.
 - Parts 3 and 4 - non-disclosure under section 36.
29. 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 to do 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.
30. The Commissioner would also stress that she is unable to consider the accuracy or adequacy of information which is held by a public authority, or to assess its veracity or otherwise.
31. The Commissioner has viewed the withheld information in this case.

Reasons for decision

Section 1 – general right of access

32. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it

holds that information and, if so, to have that information communicated to him.

33. In this case, the complainant suspects that DSFRS has not provided full copies of the information he has requested, irrespective of the exemptions cited, which will be considered below. DSFRS's position is that it has.
34. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
35. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
36. In the complainant's view, the versions of the fire control timeline and fire control incident log (parts (1) and (2) of his request) are incomplete and do not contain the full and original details.

Part (1) of the request – Fire Ground Event and Decision Log

37. This part of the request is a transcribed copy of fifteen sets of notes from books compiled by officers at the scene of the fire. It has been transcribed for ease of reading and then disclosed in full, other than redactions made under section 40 (personal information), which are considered later in this notice.
38. The complainant is not satisfied that they are an accurate representation of the original notes. The Commissioner can confirm that she has viewed a sample of the original notebook entries and she is satisfied that they are an accurate transcription of these, as far as legibility permits.

Part (2) of the request – Fire Incident Log

39. The Commissioner has been advised that this consists of two items - 1 x 49 page document and 1 x 1287 page log. DSFRS explained to her:

"The 49 page document is the beginning of a typical template for an incident log generated from the system, however due to the extremely large size of the incident, the BOSS Viewer for VISION is unable to present the information in this format and this is why we only have the first 49 pages of the log. This is why we exported the data into excel and have a 1287 page data export instead. As part of our back-up procedures and requirement to report and analyse our incident data, we have built an internal database which automatically pulls data directly from VISION and populates other necessary systems such as the Incident Recording System (IRS) required by the Home Office".

40. The 49 page document has been disclosed, other than for redactions made under section 40 (personal information) and 36 (prejudice to effective conduct of public affairs), which are considered later in this notice. The Commissioner has viewed the original log and can confirm it is an accurate representation of that.
41. The 1287 log which was provided to the complainant is a .pdf version of an excel spreadsheet which has been exported from DSFRS's incident recording system. The Commissioner has had sight of the full source document, in its original excel format.
42. The Commissioner raised queries with DSFRS regarding the content of what was disclosed to the complainant and whether any data was 'missing', drawing attention to the complainant's point that 'seconds' had not been included in the disclosed times. In responding, DSFRS explained:

"With regard to the 1287-page Fire Control Log, I have spoken with my data analytics colleague who supported us with redacting the information from the excel report that was exported directly from the Fire Control System, and we have identified what has happened. [The complainant] is correct in that the seconds are missing from the PDF copy. We now understand that the default formatting within excel for date and time is not to show seconds i.e. (dd/mm/yyyy HH:MM). Despite the raw data (including seconds) being there, it wasn't manually adjusted to show the seconds and as these weren't visible within the excel report due to the default formatting, it wasn't a realisation that this was a requirement prior to copying the text into PDF. Hence, the seconds are missing from the report sent to [the complainant]. Our rationale for providing PDF as opposed to excel is to protect our data from being edited".

43. After being made aware of the error, DSFRS advised that this data would be made available to the complainant; the Commissioner understands this has now been done.

44. The Commissioner also notes the complainant's concerns that this log should contain further information, such as the number of firefighters on each vehicle. This is correct and there are tabs within the spreadsheet which have been fully exempted under section 36, which is considered below. The full spreadsheet contain 5 separate tabs, entitled "Incident Details", "Narrative", "Appliances", "Officers" and a further tab which is a modified version of the narrative tab which was redacted for disclosure to the complainant. The Commissioner understands that, following further consideration, some content from the "Appliances" and "Officers" tabs will now be provided, albeit some names and appliance / station details will remain withheld under sections 40 and 36 of the FOIA.

The Commissioner's conclusion

45. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.
46. Based on the information provided, the Commissioner is satisfied that the information which has been considered for disclosure in response to parts (1) and (2) of the request is, on the balance of probabilities, the original information, albeit with some redactions. She is therefore satisfied that DSFRS has complied with the requirements of section 1 of the FOIA in this respect.

Section 36 – prejudice to effective conduct of public affairs

47. DSFRS has cited section 36(2)(c) in respect of call signs and some operational data in part (2) of the request, and section 36(2)(b)(ii) in respect of parts (3) and (4) of the request.

48. These provide the following exemptions:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".

49. The terminology used in these subsections is not explicitly defined in the FOIA. However, the Commissioner's guidance on section 36³ explains her understanding of the key terms as follows:

- *'Inhibit' means to restrain, decrease or suppress the freedom with which opinions or options are expressed.*
- *Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.*
- *The 'exchange of views' must be as part of a process of deliberation.*
- *'Deliberation' refers to the public authority's evaluation of competing arguments or considerations in order to make a decision".*

The qualified person's opinion

50. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and also that the opinion was reasonable.
51. The Commissioner's guidance on section 36 of the FOIA contains a section called '*Qualified person*'. That section covers, amongst other things, identifying the qualified person ("QP"), and that the QP's opinion is crucial in order to engage the exemption.
52. Her guidance also states that, in a case involving the application of section 36, the Commissioner expects that the QP would take the opportunity presented by an internal review to consider their reasonable opinion again, taking account of any comments from the complainant. However, it is noted that, on this occasion, the QP has not taken the opportunity to reconsider their opinion again at internal review as no review has been undertaken. Whilst this is unfortunate, she has considered the case in the absence of this to forego any further delays.
53. With regard to the process of seeking the opinion in this case, DSFRS explained that it consulted the QP, namely its Director of Governance & Digital Services (and Monitoring Officer), on two occasions whilst dealing

³ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

with the request. In respect of parts (3) and (4), the QP's opinion was sought regarding the application of section 36(2)(b)(ii) on 21 May 2019 and provided on 30 May 2019. In respect of part (2) of the request, the QP's opinion was sought in respect of the application of section 36(2)(c) on 5 September 2019 and was provided on 10 September 2019.

54. DSFRS provided the Commissioner with a copy of its submissions to the QP. It also provided the Commissioner with evidence of the QP's opinion and how it was reached.
55. From the evidence she has seen, the Commissioner is satisfied that DSFRS obtained the opinion of the QP on both occasions.

Was the opinion reasonable?

56. In establishing whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so, the Commissioner will consider all of the relevant factors. These may include, but are not limited to:

- whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable;
- the nature of the information and the timing of the request; and
- the QP's knowledge of, or involvement in, the issue.

57. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. The QP's opinion does not have to be the most reasonable opinion that could be held: it only has to be a reasonable opinion.

58. With respect to the limbs of the exemption claimed in this case, the Commissioner's guidance explains:

"Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority..."

59. With respect to section 36(2)(c), the Commissioner's guidance states:

"... section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used in conjunction with any another [sic] exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".

60. In applying both limbs of this exemption, DSFRS has advised that the prejudice envisaged *would* occur, ie it has applied the higher level.
61. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the information regarding the fire would inhibit the processes of providing advice and/or exchanging views (parts (3) and (4) of the request) and would otherwise prejudice the effective conduct of public affairs (part (2) of the request).
62. In respect of part (2) of the request, ie partial withholding of information with the Fire Control Incident Log, DSFRS has explained:

"Following the London Bridge (March 2017) and Manchester Arena Bombing (May 2017) terrorist attacks, the Joint Terrorism Analysis Centre (JTAC) began assessing the threat from all forms of terrorism. Terrorism threat levels give a broad indication of the likelihood of an attack. They are an important tool for security practitioners and the police to determine what protective security is necessary.

The threat level definitions are as follows:

- *CRITICAL – an attack is highly likely in the near future*
- *SEVERE – an attack is highly likely*
- *SUBSTANTIAL – an attack is likely*
- *MODERATE – an attack is possible but not likely*
- *LOW – an attack is highly unlikely*

The National threat level to the UK from terrorism is currently SEVERE and the response level is HEIGHTENED.

The UK Government Response Levels provide a general indication of the protective security measures that should be applied at any particular time. They are informed by the threat level, but also take into account specific assessments of vulnerability and risk.

There are three levels of response EXCEPTIONAL, HEIGHTENED and NORMAL.

The security measures deployed at different response levels should not be made public, to avoid informing terrorists about what we know and what we are doing about it (National Counter Terrorism Security Office).

The current national threat level is SEVERE (an attack is highly likely). This a key consideration when considering the disclosure of information relating to the emergency response to major incidents.

Disclosure of information that could assist in determining fire and rescue service mobilising plans and strategies for large scale incidents could assist a criminal, intent on carrying out a terrorist attack, to inhibit the effectiveness of any emergency response. This is not a hypothetical risk. On 29 June 2007, in London, two car bombs were discovered and disabled before they could be detonated. The first device was left near the Tiger Tiger nightclub in Haymarket at around 01:30. The second device was in Cockspur Street, which was a designated Rendezvous Point for emergency service responders.

Further reference information is available from the National Counter Terrorism Security Office:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/616572/Threat_Levels_advice.pdf

63. In respect of part (3) of the request, ie witness statements or notes taken by the officers who compiled the official report, DSFRS has explained:

"Debriefs are conducted following operational incidents as part of the fire service continuous learning and improvement and this is particularly important following serious or complex incidents. This continuous learning is an essential element of maintaining firefighter and public safety. Personnel are encouraged to be very open, honest and frank with their views in a non-attributable feedback process to ensure that all learning points are raised. For this to be effective it is essential that personnel do not feel that there is a risk recrimination or unfavourable treatment as a result of them providing comments that may be critical of themselves, colleagues, officers, equipment or procedures. If the Service was not able to maintain this 'trust environment' it would have an immediate adverse impact on operational learning that could have extremely serious consequences on firefighter and public safety.

These are life critical matters as evidenced by recent tragic events where human life has been lost, such as:

- *2005 – Harrow Court (2 firefighter fatalities and 1 member of public)*
- *2007 – Atherstone-on-Stour (4 firefighter fatalities)*
- *2009 – Lakanal House (6 members of public fatalities)*
- *2010 – Shirley Towers (2 firefighter fatalities)*
- *2017 – Grenfell (72 members of public fatalities)*

The exchange of views in such debriefs are not done under PACE regulations (where individuals are interviewed and know that they have to sign a written statement and will be more considered and guarded about what they say) but in a much more informal manner that encourages free, frank, open and honest views being expressed. This incident was a complex and serious fire that posed a significant life risk. The Breathing Apparatus crew that carried out the initial search for people in the hotel discovered failure of the adjoining wall with the property where the fire originated and were presented with a "wall of fire" going down five floors (the adjacent five storey building where the fire originated was fully involved in fire). The fact that no lives were lost in this particular incident does not diminish the importance of personnel feeling free to exchange views because important operational learning will have been captured that makes firefighters and the public safer in the future".

64. In respect of part (4) of the request, ie information and witness statements of personnel and fire officers, including Incident, Operations and Sector Commanders, who were interviewed as part of the fire investigation, DSFRS has explained:

"The purpose of a Fire Investigation is to establish the cause of a fire – it does not consider any aspects of the firefighting operations.

Information gathered by the Fire Investigation Officer during the initial stages of the firefighting operations was done under the expectation that operational personnel would give a free and frank exchange of views at a time when firefighting operations were dynamic and extremely complex. This initial free and frank exchange of views between the Fire Investigation Officer and operational personnel is an essential element of capturing information that could be critical in establishing the cause of a fire.

Being able to establish the cause of a fire is a fundamental part of improving public safety and also firefighter safety. For example, in recent years the development of Photo Voltaic Panels has presented new firefighting risks because they continue to generate electricity and learning from the determination of the cause of fire is used to

develop effective firefighting methods that address risks to firefighter and public safety. The free and frank exchange of views between the Fire Investigation Officer and operational personnel would be inhibited if it was known that the information was subject to potential release and this would have an adverse impact on operational learning, which in turn would impact on opportunities to improve public and firefighter safety”.

65. As reflected in the quotes above, the Commissioner is satisfied that the submissions to the qualified person clearly related to the request that was made by the complainant. She is also satisfied that they explained why an opinion was being sought and provided relevant background information along with some direct inspection of the withheld information.
66. Having reviewed the withheld information and the arguments presented, the Commissioner is satisfied that it was reasonable to argue that disclosure in this case would inhibit the free and frank provision of advice, would inhibit the free and frank exchange of views for the purposes of deliberation and would otherwise prejudice the effective conduct of public affairs. She therefore accepts that it was reasonable for the qualified person to reach the view that disclosure would prejudice the effective conduct of public affairs by virtue of both sections 36(2)(b)(ii) and 36(2)(c).
67. The next step is to consider the balance of the public interest. Having accepted that the opinion of the qualified person - that prejudice would result - was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the qualified person.

Public interest in favour of disclosure

68. The complainant considers that there is: *“...a great deal of public interest into what actually happened during the fire from both the general public and from members of Devon and Somerset Fire and Rescue Service (DSFRS) who are prevented from speaking publicly”.*
69. He advised the Commissioner that:

“... this fire has attracted considerable interest from the fire profession and general public both in the UK and abroad. In order to truly learn the lessons from tragic fires like this it is imperative that the truth about how the fire was able to spread from an adjacent building to what was thought to be the oldest hotel in the UK is in the public domain”.

70. In countering some of the arguments put forward by DSFRS he advised: *"Non-disclosure will certainly increase the opinion that the service has something to hide, so why would they seek to prevent the public and other interested individuals and organizations from knowing the truth?"* And he also advised the Commissioner that he had: *"... had contact with a number of those persons involved that are frightened to give their names because of repercussions within the Service but are anxious for the truth to be made public?"*

71. The complainant also raised concerns about DSFRS having undertaken a 'self-investigation' of how it had carried out its duties, adding that *"self-investigation did not work in the police service and certainly does not work in the fire service"*. Whilst this may be of concern to the complainant, the Commissioner cannot consider whether or not such practice is acceptable as this is outside her remit.

72. The complainant also raised the following arguments in favour of disclosure:

"Fire safety is an area that needs to be considered as a key learning area for everyone involved in the fire and safety profession – not just for the fire and rescue services. Even the public have an important role to play and can assist in improving fire safety by reporting problems that they see but equally the fire and rescue services have to treat this as a "two way exercise".

"Learning from operational incidents and from what went right and what went wrong is also of the utmost importance to other professionals/responsible persons within the industry who have to carry out Fire Risk Assessments on buildings".

"Information on how fire alarms are raised, how the fire spread and was contained are also extremely important to the insurance industry and manufacturers of fire detection and life saving equipment".

73. DSFRS acknowledged that disclosure of the withheld information could address some of the criticism expressed by a few individuals and reported in the media that the 'whole picture' relating to this incident was not being made available. It also accepted that non-disclosure could risk adding to the opinion of a few individuals that it had *"something to hide"*.

74. DFRS said:

"Providing confidence to the public about how the fire and rescue service operates and the plans and resources we utilise during incidents. Evidencing how public money is being spent. However,

we believe that the level of detail that is being asked for here is not necessary or beneficial to the wider public”.

75. It recognised the public interest in how it operates in emergency situations in order to protect the general public, particularly in how it determines and prioritises its resources, and the interest in it explaining how it makes its decisions. It also noted the general public interest in transparency and openness.

Public interest in favour of maintaining the exemptions

Part (2) of the request

76. DSFRS advised that it has a duty under the Fire and Rescue Services Act 2004 to extinguish fires and protect life and property in the event of fires and in order to carry out this duty we must be able to make arrangements for the personnel, services and equipment necessary to efficiently meet emergency response requirements. It explained:

“Disclosure of information that could be used to determine our mobilising plans and strategy for a large scale incident could assist a criminal intent on carrying out a terrorist attack to inhibit the effectiveness of any emergency response.

We must always take into account the current National Threat Level, which is currently rated as SEVERE (meaning that an attack is highly likely), and the response level, which is HEIGHTENED. The security measures deployed at different response levels should not be made public, to avoid informing terrorists about what we know and what we are doing about it – source: the National Counter Terrorism Security Office.

The potential risks and impact to firefighter and public safety if information about how we manage major incidents and our resources at those incidents, falls into the hands of those with malicious intent to inhibit the effectiveness of an emergency response.

Such detailed information is essential for the Service and its professionals/ partner organisations to do its work in protecting the public but is not necessary for the public to see.

We have a duty to protect the Service and wider society from potential crime and its consequences”.

Parts (3) and (4) of the request

77. DSFRS has argued that:

"This issue is one that will affect all fire and rescue services. The damage that disclosure would do to the 'safe environment' for exchange of views would have an adverse impact on shared operational learning across the whole sector. The ability to be able to readily identify 'what went wrong' or what could be done better' is essential to safeguarding firefighter and public safety across the UK".

78. It has also stated that disclosure would inhibit firefighters in providing a free and frank exchange of views as part of debriefs following an incident, which would in turn have a significant adverse impact on its ability to develop operational learning; this would have consequential impacts on firefighter safety and public safety.
79. It advised that the Service has already published a report on this incident (available on its website) and had also published substantial further information about the incident on its website.
80. DSFRS further advised that, following its own suggestion, the Ministry of Housing, Communities and Local Government commissioned and published an independent 'Fires of Special Interest' report (produced by the Building Research Establishment) in November 2018, which looked at how the fire spread from a neighbouring property (where the fire originated) to the hotel; this report is also available on its website.
81. It added:

"At the request of the Service, an independent review conducted on behalf of the National Fire Chiefs Council [NFCC] by West Midlands Fire Service is looking at: the process of compiling the report published by the Service; the range of evidence gathered to substantiate the report; and whether any evidence corroborates the public allegations that the Command decisions ignored information that may have affected firefighting operations. Further information will be published as a result of that review.

The Terms of Reference for the NFCC review is published on the Service website".

Balance of the public interest

82. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm DSFRS's ability to carry out its work. As to how much weight this should carry in the balance of the public interest, the question here is what the severity, extent and frequency would be of the prejudice identified by the QP.

83. As covered above, the Commissioner has accepted that the QP's opinion is reasonable. Whilst she considers it might fall towards the lower end of the scale that disclosing the requested information is held *would* cause the prejudice under section 36(2)(c), it is, in the Commissioner's opinion, a credible position, particularly in relation to the application of section 36(2)(b)(ii). The Commissioner is of the view that the severity, extent and frequency of the prejudice identified by the QP is relatively high, particularly with regard to the citing of section 36(2)(b)(ii) in respect of parts (3) and (4) of the request. This means that the weight that the qualified opinion carries as a public interest factor in this case is higher than would be the case were the likely severity, extent and frequency of the identified prejudice lesser, and it does therefore carry some weight.
84. The Commissioner must also recognise the importance of DSFRS's work and weigh avoiding prejudice to that work in the balance of the public interest. Clearly, it is in the public interest that a fire service is able to do the work that it does and to investigate and take necessary action in an effort to maximise its effectiveness and ensure public confidence and safety in the future, which includes continued learning from events such as this which are, fortunately, infrequent.
85. In addition to the general public interest in public authorities being open and transparent, the Commissioner recognises there is some public interest in disclosing further information, given that some details about the fire had already been reported upon and disclosed and the complainant believes there are discrepancies in what is available. However, the Commissioner notes that the events have already been scrutinised and are currently subject to further independent scrutiny by West Midlands Fire Service on behalf of the NFCC (although she notes that the complainant does not accept that this is 'independent', this is not a matter she is able to determine as it is obviously viewed as being so by the appropriate authority).
86. The Commissioner also notes the complainant's view that: "*firefighters are also quite aware that their notes and witness statements could become public at an inquest or at a public inquiry*". The Commissioner accepts that this may well be the case as a necessary part of a formal process. However, she considers that to be an entirely different situation to an unfettered disclosure to the world at large, via the FOIA, where there would be no such expectation by the parties concerned.
87. The Commissioner recognises that it is important for DSFRS to be able to rely on the notes and statements provided by those concerned. There is a need to ensure that communications from these parties are candid, open and honest when reporting to DSFRS about their actions and raising any concerns they may have. The Commissioner recognises the argument that disclosing information may impact on the candour and

honesty of submissions made which could consequently impact on the ability of DSFRS to gather an accurate record of events and to act effectively and decisively in assessing events, as well as addressing concerns and issues raised. The consequence of this may be that it impacts on DSFRS's ability to identify good and poor practice and to ensure that it provides the best possible service to the public it serves; this would clearly not be in the public interest.

88. The Commissioner also recognises the concerns raised by DSFRS in respect of revealing its deployment tactics and operational capabilities were the remaining details from within the fire control log disclosed. Whilst she understands the complainant's genuine interest in the subject, and his frustration that he has obtained similar information in other cases, this request is being considered independently as it is for a separate, major fire incident.
89. DSFRS has provided evidence to support its position that those intent on causing harm and disruption do rely on mobilisation information and how emergency services deal tactically with incidents such as this. She accepts DSFRS's arguments that this level of detail could be of genuine interest to those who may be intent on causing major disruptions to the services. Whilst she does understand the complainant's views, she believes that the potential harm to the general public that could be caused by disclosure of this level of detail, outweighs the public interest in disclosure. She further notes that there remains an outstanding report which may answer some more of the complainant's concerns.
90. In conclusion, the Commissioner considers that there is a stronger public interest in ensuring that DSFRS is able to engage freely and frankly with those concerned to consider issues and take action where the issue of public safety and use of public funds are involved. She also finds that it is not in the public interest for it to disclose detailed tactical data. In light of this the Commissioner has concluded that the public interest favours maintaining the exemptions at section 36(2)(b)(ii) and 36(2)(c) and that the information should be withheld.

Section 40 – personal information

91. This has been cited in respect of operator details, fire personnel and third parties referred to in parts (1) and (2) of the request.
92. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

93. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
94. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
95. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

96. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

97. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
98. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
99. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
100. The withheld information under consideration here is the initials of the operators who were inputting the incident data and the names of DSFRS staff and third parties who were involved with the incident.
101. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to these parties. She is satisfied that this information both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

102. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

103. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

104. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

105. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

106. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

107. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"⁵.

⁵ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

108. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

109. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

110. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

111. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

112. The complainant has not raised any specific arguments in relation to the disclosure of names other than to say: "*I can see no reason why names, actions, times and vehicle movements should be redacted*", although it is noted that he has advised that on other occasions this type of information has been provided to him.

Is disclosure necessary?

113. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

114. As the complainant has not provided details of any legitimate aim or any arguments supporting specific disclosure of the names these cannot be taken into consideration. Furthermore, considering the wording of the request and the efforts by the complainant to establish the accuracy and detailed timelines of events it is not clear to the Commissioner why

disclosure of any names would further assist him in this and why it would therefore be necessary in this case. It is also noted that DSFRS has agreed to disclose Area Manager names to further transparency.

115. As the Commissioner has decided in this case that disclosure is not necessary to meet any legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

116. The Commissioner has therefore decided that DSFRS was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Other matters

117. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Handling of request

118. Whilst she recognises the broad nature of this request, and the significant burden it has placed on DSFRS to deal with it, the Commissioner notes that it has taken ten months from the request being made until DSFRS provided the final part of its staged response to the complainant. Whilst the complainant did not specifically ask the Commissioner to consider timeliness she nevertheless notes this significant delay.

119. It is also noted that these delays have resulted in DSFRS not being afforded the opportunity to conduct an internal review, albeit it is noted that its responses have all been reconsidered during the Commissioner's investigation which has resulted in further disclosure.

120. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy⁶ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

⁶ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

Reference: FS50832220



through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁷.

⁷ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

121. 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

122. 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.

123. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF