

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2022

Public Authority: Oldham Council

Address: Civic Centre
West Street
Oldham
OL1 1UL

Decision (including any steps ordered)

1. The complainant has requested information from Oldham Council ("the Council") regarding safety certification for Boundary Park Stadium. The Council provided the complainant with some information, however it refused to disclose the remainder ("the withheld information), citing section 38(1) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied section 38 to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 1 December 2020, the complainant wrote to the Council and requested information in the following terms:

"Please send me:

Copies of the Safety advisory certification/assessment for Boundary Park football stadium Futherwood Rd, Oldham, for the last 5 years.

Copies of any remedial action requested to the owner of the safety certification, specifically in the last 5 years.

Copies of any relevant meeting notes with regards to Boundary Park football stadium in the last 5 years.”

5. The Council responded on 2 February 2021. It provided the complainant with information in response to the first part of their request, however it stated that although it held information within the scope of the second and third part of that request, it would not disclose that information (“the withheld information”) as it considered that section 31 of FOIA applied as a basis for non-disclosure.
6. Following an internal review requested by the complainant on 2 February 2021, the Council wrote to the complainant on 26 April 2021. It stated that the reviewer agreed with the complainant that section 31 of FOIA did not apply to the withheld information, however the withheld information was now considered exempt from disclosure under section 38(1) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 25 July 2021 to complain about the way their request for information had been handled.
8. The Commissioner has considered the Council’s handling of the complainant’s request, particularly its application of section 38(1) of FOIA to the withheld information.

Reasons for decision

Section 38-health and safety

9. Section 38(1)(a) of FOIA states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to –

(a) Endanger the physical or mental health of any individual”.

10. Section 38 provides an exemption from disclosing information if it would endanger any individual (including the applicant, the supplier of the information or anyone else). Section 38(1)(a), the limb cited in this

case, focuses on endangerment to any individual's physical or mental health.

11. The Commissioner's guidance 'Section 38 - Health and Safety'¹ states: "The use of the phrase "any individual" in section 38 includes any specific individuals, any member of the public, or groups within society".
12. In order to satisfy the Commissioner that this exemption is engaged, the public authority must demonstrate that there is a causal link between the endangerment and disclosure of the information.
13. The public authority must also show that disclosure would, or would be likely to, have a detrimental effect on the physical or mental health of any individual. The effect cannot be trivial or insignificant. In the context of section 38, even if the risk falls short of being more probable than not, it needs to be such that there may very well be endangerment.

The applicable interests

14. The Commissioner accepts that the actual harm which the Council alleges would, or would be likely to, occur if the withheld information was disclosed relates to the applicable interests which the exemption is designed to protect, as the Council states that disclosure of the withheld information would, or would be likely to, endanger the physical or mental health or the safety of individual spectators and staff within the stadium.

The nature of the endangerment

15. The Commissioner's guidance states: "Endangering mental health... means it must have a greater impact than causing upset and distress."
16. The Commissioner must consider if there is a causal link between the requested information and the endangerment that section 38(1)(a) is designed to protect. In order to do so, the Commissioner has reviewed the withheld information.
17. The Commissioner recognises that a public authority will not necessarily be able to provide evidence in support of a causal link,

¹ <https://ico.org.uk/for-organisations/section-38-health-and-safety/>

because the endangerment relates to events that have not occurred. However, there must be more than a mere assertion or belief that disclosure would lead to endangerment: there must be a logical connection between the disclosure and the endangerment in order to engage the exemption.

18. In this case, he accepts that the Council explained that there is a realistic potential for the withheld information, which relates to safety and security arrangements, if disclosed into the public domain, to be utilised in the perpetration of a malicious act and, therefore, endanger the physical or mental health of the staff and spectators.

Likelihood of endangerment

19. The Commissioner takes the view that the phrase 'would be likely to endanger' is a lower threshold than 'would endanger'.
20. In its correspondence with both the complainant and the Commissioner, the Council has cited 'would' or 'would be likely to'. The Commissioner has considered which threshold, if either, applies in this case.

Is the exemption engaged?

21. The Commissioner cannot give an expert opinion on whether disclosure of the information would be likely to endanger the physical or mental health of the applicant or any other individual.
22. However, he recognises that, as stated by the Council, there are continued negotiations regarding Health & Safety with Oldham Athletic Football Club ("the Club"). It is usual for the Safety Advisory Group (SAG) to meet up 4 times per year and the fact that the meetings have taken place up to 8/10 times each year is indicative of the ongoing issues at the Club.
23. The SAG comprises partners from the Council's Building Control, Police, Fire and Rescue and the Ambulance Services and the primary role of the SAG is to provide advice and guidance to a football club's safety management team on accommodating spectators safely within their stadium. This includes advice and guidance on sensitive issues such as spectator ingress and egress, crowd management, fire safety, personal security, anti-terrorism procedures etc and issuing the General and Special Safety Certificates under the Safety of Sports Grounds Act 1975.
24. The Council believes to make the advice and guidance on these issues public would likely be detrimental to effective delivery of statutory duties of the Council, the Police, Fire and Ambulance Services, which

would be likely to lead to endangerment to the physical or mental health of staff and spectators at the stadium.

25. The Council has also made the Commissioner aware that there was a recent invasion of the pitch during a relegation match against Salford City, which has been widely reported in the media. The Club is liaising with Greater Manchester Police as a criminal offence has been committed. The Council stated that this is not the first pitch invasion in recent years, and strong measures were once again implemented by the Safety Advisory Group prior to the next match in the stadium.
26. Having considered the submissions provided by the Council, and the likely consequences of the disclosure of this information into the public domain, the Commissioner is satisfied that the Council has demonstrated the extent of endangerment necessary to engage section 38(1)(a).
27. Having concluded that section 38(1)(a) is engaged, and satisfied that the lower level of 'would be likely to endanger' has been demonstrated, the Commissioner has gone on to consider the balance of the public interest.

The public interest test

28. The public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption.
29. The Commissioner recognises that the complainant has a specific interest in the requested information and does not consider that its disclosure would be in any way likely to be detrimental to the physical or mental health of any individual.
30. The Commissioner's guidance on the public interest test² addresses the question of the private interests of the requestor. It recognises that the requestor's private interests are not in themselves relevant to the public interest test and that there would only be a public interest argument if it could be shown that there is a wider public interest that would be served by disclosing the information.

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

Public interest arguments in favour of disclosing the information

31. The Council acknowledges the significant public interest in openness and transparency as the subjects discussed by the Safety Advisory Group at their meetings relate explicitly to public safety, specifically the steps taken to protect the physical and mental health of those in and around the stadium.
32. The Commissioner also accords significant weight to openness and transparency as it would demonstrate to the public the measures which are being taken to protect those who work at or attend the stadium, or those in close proximity to it.

Public interest arguments in favour of maintaining the exemption

33. However, the Council does not consider it in the public interest to publish information on these matters nor does it consider that the public interest would be best served by disclosing documentation presented to or produced by the Safety Advisory Group that relates specifically to the stadium and measures taken to ensure public safety. As it is of the view that there is a potential for the withheld information relating to safety and security arrangements to be utilised in the perpetration of a malicious act it considers that disclosure of this which may enable such an act would not be in the public interest.
34. The Commissioner accepts that anything which would be likely to contribute to the perpetration of a malicious act which would place the health of individuals in danger would not be in the public interest, therefore significant weight is also accorded to maintaining the exemption.

Balance of the public interest arguments

35. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental wellbeing. The natural consequence of this is that disclosure under FOIA will only be justified where a compelling reason can be provided to support the decision.
36. Clearly in any such situation where disclosure would be likely to lead to endangerment to health, there is a public interest in avoiding that outcome.
37. In reaching a decision in this case the Commissioner must take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the world at large, without conditions. The wider public interest issues and the fairness to those parties involved must therefore be considered when deciding whether or not the information requested is suitable for disclosure.

38. The Commissioner accepts that there is a significant public interest argument in favour of openness and transparency regarding health and safety issues, particularly in relation to a venue such as a stadium, where the protection of the health and safety of many individuals is paramount.
39. The Commissioner has also taken into account the Council's view that disclosure of the information could be detrimental to the very bodies who are entrusted with the health and safety of the individuals mentioned above being effectively able to carry out their statutory duties. In view of the fact that several pitch invasions have occurred, the Commissioner accepts that this is a real threat, and disclosure of the withheld information relating to health and safety measures may enable the perpetration of a malicious act.
40. As the Terms of Reference of the Safety Advisory Group (SAG) meetings state that the purpose of such meetings is **specifically**

"to uphold reasonable standards of public safety at all sports grounds and public events listed herein and to encourage the wellbeing of the public at those sports grounds and public events"

the Commissioner accepts that there is a realistic concern that public safety and wellbeing would be likely to be placed in jeopardy, ie endangered, should the information regarding what is discussed in SAG meetings be disclosed to the public.
41. The Commissioner is therefore of the view that the public interest in maintaining public safety and wellbeing and not putting it at potential risk by disclosing the withheld information outweighs the public interest in openness and transparency regarding health and safety measures.

Right of appeal

42. 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

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Deirdre Collins
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