

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2016

Public Authority: Isle of Anglesey County Council
Address: Council Offices
Llangefni
Anglesey
LL77 7TW

Decision (including any steps ordered)

1. The complainant has requested a copy of an independent fire report into Haulfre Residential Care Home. The Council withheld the information in reliance on section 38 and section 31 of the FOIA. The Commissioner's decision is that the Isle of Anglesey County Council has correctly relied on section 38 of the FOIA to withhold the information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 1 July 2015, the complainant wrote to the Council and requested the following information in respect of an independent fire report into Haulfre Residential Care Home:

"I have not seen the fire report (nor have they) and would be grateful if you could let me have a copy."
3. The Council responded on 15 July 2015. It stated that the fire report would not be made available as they consider that the information is exempt by virtue of section 38 (Health and Safety) and section 31 (Law Enforcement) of the FOIA
4. Following an internal review the Council wrote to the complainant on 21 September 2015. It stated that the review had concluded that the information was correctly withheld.

Scope of the case

5. The complainant contacted the Commissioner 24 October 2015 to complain about the way her request for information had been handled. The complainant was not satisfied with the Council's response and stated that no explanation had been given as to the reasons for the refusal. The complainant further stated that she did not accept that the report could be withheld either on the basis of section 38 or section 31 of the FOIA.
6. The Commissioner has considered whether the disputed information is appropriate for disclosure on the basis of section 38 (Health and Safety) of the FOIA. As he has concluded that the exemption is engaged and the public interest favours maintaining the exemption, he has not gone on to consider section 31.

Reasons for decision

Section 38 health and safety

7. Section 38(1) of the FOIA provides 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, or*
- (b) endanger the safety of any individual."*

The prejudice test

To determine whether the application of section 38(1) to the requested information was correct under the terms of the FOIA, the Commissioner has considered the 'prejudice test', in this case whether disclosure of the information would cause endangerment to the health and safety of one or more individuals.

8. Unlike the other exemptions in the FOIA subject to the prejudice test, the word 'endanger' is used in section 38 rather than the word 'prejudice'. However, the Commissioner does not consider that the use of the term 'endanger' represents a departure from the test of prejudice to which section 38 is subject.
9. In *Hogan v the Information Commissioner and Oxford City Council* (EA/2005/0026 and 0030) the Tribunal stated that:

"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption ... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

The applicable interest

10. As section 38 of the FOIA provides that information relating to the endangerment of the health and safety of an individual can be withheld, the prejudice involved in the disclosure of the requested information must therefore relate specifically to the health and safety of one or more individuals.
11. In this case, the requested information is a copy of the independent fire report conducted in June 2015 regarding Haulfre Residential Care Home, the disclosure of which the Council considers would endanger the health and safety of the residents and staff of Haulfre Residential Care Home.

The nature of the prejudice

12. The Council has argued that disclosure of the information into the public domain would lead to an increased risk of arson which would endanger the physical or mental health of the residents and staff and also endanger their safety.
13. The Commissioner considers it would be artificial to draw a distinction between a threat to (a) the physical and mental health and (b) safety in this context. Further, the Commissioner accepts that where individuals are under threat of attacks on their physical health, this is likely to affect their mental health. Therefore where the Commissioner considers the exemption to be engaged, he considers both limbs of section 38(1) apply.
14. In relation to this approach, in *PETA v the Information Commissioner and the University of Oxford EA/2009/0076*, the Tribunal stated that:

"it was suggested by PETA [People for the Ethical Treatment of Animals] that for the Tribunal to be satisfied that there was a danger to mental health that positive evidence from e.g. a psychiatrist as to the clinical impact of the campaign upon the mental health of those affected would be necessary. The Tribunal rejected this contention and was satisfied that the level and nature of the physical threat was sufficient that on a balance of probabilities the effect upon the mental health of those involved would go beyond stress or worry and constitute an endangerment to their mental health."

The likelihood of prejudice

15. The Commissioner's duty in this case is to consider whether disclosure of the requested information would be likely to pose a risk to the health and safety of the residents and staff of Haulfre Residential Care Home.
16. The Tribunal, in the case of *John Connor Press Associates Limited v Information Commissioner (EA/2005/0005)*, stated that *"the chance of prejudice being suffered should be more than a hypothetical possibility, there must have been a real and significant risk"* (Paragraph 15).
17. The Commissioner has interpreted this to mean that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
18. The Council accepts that the risk of arson is an unknown and unquantifiable factor. However, the Council took the view that whereas the building is probably at no greater risk than any other building it owns, the aged and infirm conditions of the residents does increase the likelihood that any attempts at arson could be injurious to the residents and staff. The report highlights specific vulnerabilities associated with the building and its residents in the event of a fire.
19. Whilst it does not have information regarding the number of arsonists within Anglesey, it is suspected that there are arsonists in the region. In support of this, the Council has provided photographic evidence of a sign placed in rural North Wales by the North Wales Fire and Rescue Service acknowledging the risks of arson within the area.
20. Additionally, the Council considers that it is recognised that arson is an unwelcome occurrence in rural areas such as the location of the Care Home, and in terms of the Care Home itself, the Council has cited a fatal arson attack on St. Michael's Hospice in St. Leonards, East Sussex in July of 2015.
21. Taking all of these factors into consideration, the Council concluded that as the report would be likely to assist a potential arsonist to target the building's vulnerabilities.
22. Having considered the arguments presented by the Council, and the withheld information itself, the Commissioner is satisfied that the disclosure of the report would be likely to assist a potential arsonist to target the vulnerabilities outlined in the report, and has therefore concluded that section 38(1)(a) of the FOIA is engaged in relation to the requested information. However, as section 38 is a qualified exemption, the Commissioner also needs to consider the public interest test.

Public interest factors in favour of disclosure

23. The Council has acknowledged that there is a general public interest in the accountability and transparency in its decision making and expenditure of public money.
24. It has also acknowledged the public interest in transparency in issues surrounding the safety of vulnerable individuals so that the Council is held accountable.

Public interest factors in favour of maintaining the exemption

25. The Council considers that there is an obvious public interest in not disclosing the vulnerabilities of buildings, particularly where they could be exploited resulting in harm or even death to individuals.

The balance of the public interest test

26. In its consideration of where the weight of public interest lies, the Council considers that the public interest in transparency and therefore disclosure is diminished, as the information has been shared with Councillors and external agencies such as the Care & Social Services Inspectorate Wales (CSSIW) on a confidential basis, to monitor progress and hold the Council to account.
27. The Council also considers that the public interest in disclosure is further diminished because information about the various issues with the Care Home has been provided to the relatives of the residents by means of a proactive and rolling system of consultations and disclosure of relevant information.
28. The Council concluded that taking into consideration the strong public interest in not disclosing the vulnerabilities of buildings, particularly where they could be exploited resulting in harm or even death to individuals, that the balance is weighted in favour of maintaining the exemption.
29. The Commissioner has balanced the real and significant threat to the health and safety of the residents and staff of Haufre Care Home which would be likely to result from the disclosure of this information, against the public interest arguments in favour of disclosure.
30. The Commissioner does not consider that the disclosure of information to demonstrate the transparency and accountability of the Council's decision making, justifies the risk to the health and safety of the residents and staff of Haufre Residential Care Home. The Commissioner has therefore concluded that the Council correctly relied on section 38(1)(a) of the FOIA in respect of this request for information.

Right of appeal

31. 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

32. 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.
33. 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

Andrew White
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