

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Housing, Communities and Local Government (MHCLG), now called Department for Levelling Up, Housing and Communities (DLUHC), about data collected about caravans on unauthorised sites. It disclosed some of the information requested but also refused to disclose some, citing the health and safety exemption under section 38(1)(b) of FOIA as its reason for doing so on the basis that disclosure of the information would be likely to endanger the safety of individuals.
2. The Commissioner's decision is that DLUHC has correctly relied on section 38(1)(b) and that the balance of the public interest favours maintaining this exemption.
3. The Commissioner does not require further steps.

Request and response

4. On 19 January 2021, the complainant wrote to MHCLG and requested information in the following terms:

"I believe that via local councils you keep a log of caravans on unauthorised sites in July of every year broken down by those on

unauthorised developments and those on unauthorised encampments.

Q1: Could you please provide me with these figures for England for each of the last seven years?

Q2: Could you state what the difference is between unauthorised developments and unauthorised encampments?

Q3: For the most recent year could you provide me with details of the five largest unauthorised sites – giving the number of caravans, the location of the site and the local authority where it is located.”

5. MHCLG responded on 15 February 2021. It provided a link to the information requested in question one. It provided the information requested in question two. It refused to provide the information requested in question three, citing the health and safety exemption under section 38(1)(b) of FOIA on the basis that disclosure of the information would be likely to endanger the safety of individuals.
6. Following an internal review the MHCLG wrote to the complainant on 26 April 2022. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 13 June 2021 to complain about the way his request for information had been handled.
8. The following analysis considers whether the exemption at section 38(1)(b) of FOIA was cited correctly.

Reasons for decision

Section 38 - Health and Safety

9. Section 38(1) of the 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, or

(b) endanger the safety of any individual.”

10. The Commissioner's published guidance on section 38¹ states that the use of the term 'endanger' can be interpreted as having the same meaning as 'prejudice', thereby making it appropriate to consider the prejudice test as set out in PETA v IC and University of Oxford EA/2009/0076².
11. However, in the more recent case of Lownie v IC, the National Archives and the Commonwealth Office EA/2017/0087³, the First-tier Tribunal (Tribunal) took the view that had it been the intention of Parliament for section 38 to depend upon the same 'prejudice' test as the other relevant exemptions contained within the FOIA, then it would have used the same language. It stated that attempting to assimilate the two tests of prejudice and endanger 'merely muddies the waters' and therefore, for 'the purposes of s 38 we must apply the words of section 38, not the words of different exemptions.'
12. The Tribunal also made it clear that the term 'would' endanger refers to something 'more likely than not' to occur (that is the probability is greater than 50%). With regard to 'would be likely to' endanger, the Tribunal stated that this is only applicable where there is a 'very significant and weighty chance' of occurrence, such as that the occurrence 'may very well' occur.
13. The Tribunal went on to say that a 'real risk' is not enough to satisfy the application of the exemption and referred to a number of previous cases, including Hogan and Oxford City Council v IC, EA/2005/0026⁴ and BUAV v IC and Newcastle University, EA/2010/0064⁵ as providing an appropriate explanation of the degree of likelihood that it meant by 'would be likely to' in section 38.

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

² http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i385/Open_Decision_0076_amended_aabbcc.pdf

³ http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2252/EA-2017-0087_Decision_2018-07-11.pdf

⁴ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

⁵ [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i605/%5b2011%5d_UKFTT\(GRC\)_EA20100064_2011-11-11.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i605/%5b2011%5d_UKFTT(GRC)_EA20100064_2011-11-11.pdf)

Section 38(1)(b) - endanger the safety of any individual

14. DLUHC argues that to disclose the withheld information, which is information about the size and location of the five largest unauthorised sites, would be likely to endanger the safety of residents on the traveller sites in question.

The causal relationship

15. The Commissioner notes that the complainant makes the point that it is likely that the locations on the five largest unauthorised sites are already in the public domain, especially for those who live close to the sites. He agrees that the existence of each of the individual sites will already be known to those living nearby, however, he accepts DLUHC's argument that to disclose a list of the locations of the five largest unauthorised sites would increase the audience that holds the information.
16. DLUHC argues that disclosure of the withheld information to the world at large would significantly increase the audience that holds this information including those who may have criminal intent and that this would have the potential to endanger the safety of individual residents on the traveller sites in question because disclosure could lead to them being threatened or harassed.
17. DLUHC highlights a number of studies regarding the inequalities and discrimination experienced by Gypsy, Traveller and Roma (GTR) communities including the prevalence of racism and hate crime towards them.⁶⁷⁸
18. One of these reports⁸ (which was funded by DLUHC) specifically highlights a link between publicity around issues relating to GTR communities including media reporting of unauthorised encampments and increased hate speech and hate crimes against GTR communities.
19. The Commissioner notes that the complainant disputes DLUHC's suggestion that releasing the information may mean it gets to those with a criminal intent. However, the Commissioner accepts DLUHC's

⁶ [The-Last-Acceptable-Form-of-Racism-2017.pdf \(travellermovement.org.uk\)](#)

⁷ [research_report_12inequalities_experienced_by_gypsy_and_traveller_communities_a_review.pdf \(equalityhumanrights.com\)](#)

⁸ [Rain-Report-201211.pdf \(gateherts.org.uk\)](#)

argument that GTR communities are vulnerable to hate crime. He is also of the view that confirmation that the site is one of the five largest unauthorised sites could lead to the site and its residents being targeted.

The likelihood of the endangerment occurring

20. DLUHC argues that a disclosure of the information 'would be likely' to endanger the safety of the individuals it has identified. The Commissioner has therefore considered whether there is a 'very significant and weighty chance' of occurrence, such as that the occurrence 'may very well' occur.
21. The Commissioner considers that DLUHC's arguments are persuasive. He accepts that if this information were to be disclosed there is a very significant and weighty chance of the safety of the residents on the traveller sites in question being endangered.
22. Key to this assessment is an understanding of the vulnerability of the GTR community to hate crime. GTR communities experience wide-ranging inequalities. A survey carried out by the Traveller Movement in 2017 found that 91% of the 199 respondents had experienced discrimination and 77% had experienced hate speech or hate crime.⁶ This reflects a report by the Equality and Human Rights Commission in 2009 which stated that racism towards most ethnic minority groups is now hidden, less frequently expressed in public, and widely seen as unacceptable. However, that towards Gypsies and Travellers is still common, frequently overt and seen as justified.⁷ The same report states that those living on unauthorised sites can be particularly vulnerable to harassment. Although incidents of hate crime are under reported to police by the GTR community, there is significant evidence that such crimes are common place and often include threats of serious violence.⁸ The Commissioner is therefore satisfied that should the data be disclosed residents of the sites may very well be targeted in hate crimes which would endanger their safety.

The Commissioner's conclusions

23. The Commissioner has decided that DLUHC is correct in that section 38(1)(b) is engaged by the withheld information. Since it is a qualified exemption, he must therefore go on to consider the public interest test required by section 2 of the Act.

The public interest

24. The test, as set out in section 2(2)(b), is whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

The public interest in the disclosure of the information

25. In addition to the general presumption of openness under FOIA, DLUHC acknowledges the public interest in transparency with respect to traveller sites, including awareness of the location of large-scale unauthorised sites and the numbers of residents living on them.
26. It also notes that making this information available would supplement other data in this area that the government publishes.

The public interest in the exemption being maintained

27. DLUHC argues that GTR communities are a particularly vulnerable group whose safety may be more easily endangered than others in society and as such there is a significant public interest in ensuring the safety of individuals resident on large traveller sites, who may be targeted by those who would wish them harm.
28. DLUHC also argues that the government already publishes a statistical count of the number of caravans on both authorised and unauthorised sites across England twice per year and the public interest is served in this way.

The Commissioner's analysis

29. The Commissioner recognises the public interest in transparency with respect to traveller sites, including awareness of the location of large-scale unauthorised sites and the numbers of residents living on them.
30. However, there is a significant public interest in ensuring the safety of individuals resident on the large unauthorised sites, who the commissioner accepts are particularly vulnerable to hate crime.
31. In addition, he agrees that the data already published by the government goes some way to meet the public interest in transparency with respect to traveller sites.
32. For these reasons, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. MHCLG was not, therefore, obliged to disclose the withheld information.

Right of appeal

33. 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

34. 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.
35. 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

Ben Tomes
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