

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 February 2008

Public Authority: Health and Safety Executive
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Summary

The complainant asked the Health and Safety Executive (the "HSE") for information about an analysis of a report of an investigation carried out into a potentially fatal accident on a building site. HSE refused to disclose the analysis under the exemption contained in section 30(1) of the Act. The Commissioner found that section 30 was engaged but concluded that the public interest in maintaining the exemption was outweighed by the public interest in disclosure. The Commissioner also found that HSE's refusal notice had not complied with the requirements of section 17(7) of the Act. The Commissioner requires HSE to disclose the withheld information within 35 calendar days from the date of this notice.

The Commissioner's Role

1. 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 29 December 2005 the complainant wrote to HSE requesting a copy of its report of an investigation into an incident in which a cement mixer fell from a hoist on a building site, narrowly missing the operator of the hoist and the complainant. HSE provided the complainant with a document about the incident, and headed 'factual report', on 16 January 2006.
3. On 26 January 2006 the complainant asked for information relating to any analysis made of the report. On 21 February 2006 HSE replied to the complainant, stating that it was withholding the information requested by virtue of the exemption in section 30(1)(a) of the Act. HSE said that disclosure of the

analysis would prejudice its ability to communicate fully and frankly and in confidence with stakeholders and other law enforcement agencies; impede the general willingness of individuals and organisations to supply information to HSE; and, in some circumstances, endanger the health and safety of witnesses or others.

4. On 2 March 2006 the complainant wrote to HSE asking for an internal review of its decision to withhold the requested information. He also pointed out that HSE had failed to provide details either of its internal review procedures or of his right to complain to the Commissioner after any internal review procedures had been exhausted.
5. On 21 April 2006 HSE replied to the complainant with the outcome of its review of the decision to withhold the analysis of the investigation. HSE accepted that the public interest reasons for withholding the information had not been communicated clearly to the complainant and apologised for the failure to inform him of HSE's internal review procedure, or of his right of appeal to the Information Commissioner. However, HSE upheld the application of the section 30 exemption to the analysis of the investigation report. HSE considered that the analysis fell within the scope of the exemption because the information which it contained was held in connection with its investigation of a possible offence.
6. HSE recognised that section 30 was subject to the public interest test and stated that it had concluded that the public interest in withholding the information outweighed that of disclosing it. HSE explained that the analysis sought by the complainant contained information on how it might structure enforcement or legal matters and that such information would be of use to offenders wishing to avoid prosecution or conviction, which would clearly not be in the public interest. HSE recognised that there was a general public interest in transparency in the way in which public bodies discharge their duties, but said that there was already Parliamentary oversight of bodies such as HSE as well as ways of allowing members of the public to question procedures and decisions, while ensuring that the work of those bodies is not prejudiced. HSE accepted that there would appear to be little risk to the health and safety of witnesses and others should the information be released, but that other considerations such as the right to a fair trial under the Human Rights Act 1998 were legitimate considerations in withholding the information.

The Investigation

Scope of the case

7. On 6 May 2006 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled, and to ask him to investigate HSE's decision to withhold the analysis of the factual report of the accident. The complainant was concerned that no explanation had been given as to why no prosecution had resulted from the investigation, and considered that such information would provide evidence of potential flaws in the legislation

governing HSE's investigations. He believed that questions about the investigation remained unanswered and that, without access to full reports and documentation, it was not possible to have confidence that all the relevant issues had been properly addressed. The Commissioner therefore focussed his investigation on assessing the nature of the information withheld and determining whether or not HSE had correctly applied the section 30 exemption to that information.

Chronology

8. On 9 May 2007 the Commissioner contacted HSE asking for a copy of the information withheld from the complainant together with all other relevant documents and communications. The Commissioner also asked for clarification of the application of the exemption to the withheld information. HSE subsequently provided to the Commissioner all of the requested information, including the analysis dated 31 August 2005, and expanded on its reasons for applying section 30 to the information sought. Details of the exemption are set out in the Legal Annex to this Decision Notice.
9. HSE said that the analysis section of the investigation report was exempt from disclosure under section 30(1) of the Act as it was held 'at any time' by HSE for the purposes of a criminal investigation and possible criminal proceedings. HSE accepted, however, that the analysis was a qualified exemption and was therefore subject to the public interest test.
10. In terms of considering the public interest test, HSE acknowledged that the investigation had concluded almost two years ago and that no proceedings had been brought against any person or company, which made it more difficult to rely on the exemption. It also accepted that it is in the public interest to ensure that authorities inform the public of matters affecting their lives. HSE recognised that it is important to assist the public to understand why an investigation has reached a particular conclusion, and to be able to see that the investigation has been properly carried out.
11. However, HSE said that, as there was no suggestion that its investigation was in any way deficient or improper, there was limited, if any, public benefit in disclosing information concerning the inspector's analysis of the incident. HSE added that it should be borne in mind that its conclusions regarding the investigation had already been provided to the complainant. HSE failed to see how its internal deliberations and reasoning which gave rise to those conclusions would assist the complainant further, given the significant amount of information already disclosed.
12. HSE considered that the public interest in favour of disclosure needed to be balanced against the public interest in ensuring that its ability as an enforcing authority to carry out future investigations was not impeded in any way. It believed that this rationale was similar to that for a claim in litigation for public interest immunity regarding investigation reports sent from the Police to the Director of Public Prosecutions. HSE said that it was also not in the public interest to disclose analyses regarding investigations and deliberations as to whether or

not proceedings should be brought, as to do so could reveal to potential lawbreakers the exact basis upon which decisions are made to prosecute or not to prosecute. The risk was that this type of information could assist potential lawbreakers to avoid prosecution, and it has been held that public interest immunity can also attach to information in such circumstances.

13. HSE explained that its comment about Parliamentary oversight in its response to the complainant was a general comment about HSE's constitutional accountability and the fact that civil servants are accountable via Ministers to Parliament for their actions and decisions. Mechanisms such as the Select Committee and the Parliamentary Ombudsman underpin this accountability.

Analysis

Procedural matters

Section 17 – refusal notice

14. Section 17(7) of the Act states that a refusal notice issued in response to a request must contain:
 - Details of the public authority's complaints procedure in relation to requests made under the Act, and
 - Details of the right to complain to the Commissioner under section 50 of the Act.
15. In this case, the refusal notice issued by HSE dated 21 February 2006 did not contain either of these requirements, and the Commissioner therefore finds that the notice failed to comply with section 17(7) of the Act. This merits criticism. However, the Commissioner recognises that HSE apologised for that failure in the outcome of its review dated 21 April 2006.

Exemption

Section 30(1)

16. Section 30(1) provides that information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which the authority has a duty to conduct with a view to it being ascertained (i) whether a person should be charged with an offence or (ii) whether a person charged with an offence is guilty of it. As section 30 is a class based exemption it is not necessary for HSE to demonstrate that disclosure would prejudice the conduct of an investigation in order to engage the exemption.
17. HSE explained that it has a duty under the Health and Safety at Work etc Act 1974 to investigate possible breaches of that Act and to institute proceedings where appropriate. Clearly, in this case HSE investigated a potentially fatal accident on a building site which led to a report being prepared and consideration given to prosecution. The information requested relates to an analysis of that report, and the Commissioner therefore agrees that the information was held for

the purposes of an investigation with a view to ascertaining whether a person should be charged with an offence. As section 30 relates to information held 'at any time', the fact that the investigation has concluded does not mean that the information is not covered by the exemption. The Commissioner therefore finds that the section 30 exemption is engaged.

Public Interest Test

18. Section 30 is a qualified exemption and is therefore subject to the public interest test. The Commissioner recognises that there is an inherent public interest in ensuring the ability of public authorities to carry out investigations effectively. However, in the decision of the Information Tribunal *DfES v the Commissioner and the Evening Standard (EA/2006/0006)*, the Tribunal concluded that it was incorrect to take the view that disclosing information covered by a class based exemption such as section 30 would cause inherent damage. Therefore, the information in question may only be withheld where the public interest in maintaining the exemption clearly outweighs the public interest in its release.
19. In its response to the Commissioner, HSE referred to guidance issued by the Commissioner and by the Ministry of Justice; and to Decision Notices and judgments in relation to the release of information about investigation reports. HSE has put forward the following arguments in favour of maintaining the exemption:
 - Disclosure could jeopardise HSE's ability to carry out future investigations effectively
 - Investigation reports contain communications and comments on evidence collected by law enforcement agencies and those agencies should be able to communicate fully and frankly
 - The type of information contained in the analysis could assist potential lawbreakers to avoid prosecution
 - As there was no suggestion that HSE's investigation was inadequate, there would be little public interest in the analysis
 - A considerable amount of information about the investigation has already been provided to the complainant, and disclosure of internal deliberations would not assist the complainant further
 - The fact that Parliament has provided, in section 63(1) of the Act that information which is exempt under section 30(1) should lose that exemption thirty years after it was created suggests that the exemption should apply even where an investigation has long been completed, and that the information should only be disclosed if the public interest in maintaining the exemption is clearly outweighed by the public interest in disclosure
 - There is already Parliamentary oversight of the work of HSE and mechanisms to allow members of the public to question procedures and decisions
 - Other issues such as the right to a fair trial under the Human Rights Act 1998 had to be considered in withholding the information

20. The complainant believes that, in view of the seriousness of the incident, there is a strong public interest argument in favour of disclosing the information. In particular, he considers that the public is entitled to know why such a serious event did not lead to a prosecution. The arguments considered for disclosure of the information are detailed below:

- There is a strong public interest in promoting openness and transparency in the discharge of a public authority's statutory functions
- Disclosure of the information would help the public to understand why conclusions were reached, and in particular the decision not to institute legal proceedings following a potentially fatal incident
- HSE has accepted that the analysis does not contain any contentious or sensitive information
- The investigation was completed more than two years ago, and there are no outstanding issues
- There has indeed been a suggestion that the investigation was flawed

21. The Commissioner has considered the competing public interest arguments in favour of maintaining the exemption and in favour of disclosure in the context of the information held in the analysis section of HSE's report into this incident. As HSE has recognised, the Commissioner has issued updated guidance on this exemption. In considering the public interest test, the guidance states:

'For this exemption, it will involve weighing the harm that may be caused to an investigation against the wider public interest in disclosure. The public interest in disclosure of information is likely to be weaker while an investigation is being carried out. However, once an investigation is completed, the public interest in understanding why an investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out, could well outweigh the public interest in maintaining the exemption'.

22. It should be made clear at this stage that the public interest test is only concerned with public interests rather than private interests, however understandable those interests might be. This was recognised by the Information Tribunal in its decision in the case of Hogan v Oxford City Council (Tribunal Ref: EA2005/0026 and EA2005/0030).

23. The Commissioner appreciates that it is important that HSE should be able to investigate accidents such as the one in question effectively and unimpeded by concerns about external scrutiny. However, in this particular case, the analysis report contains limited information in addition to that already released. The only significant additional information relates to obligations placed upon employers and employees by the Health and Safety at Work etc Act 1974, and brief reasons for the decision not to pursue legal action against the parties involved. No contribution or evidence from outside agencies or people is included in the analysis, and the only organisations and personnel named had already been identified in the factual report which had previously been provided to the complainant.

24. The analysis section of the report contains no obviously sensitive information and no witness statements or reports from outside bodies. Moreover, the Commissioner can see no information which refers to the structuring of enforcement matters and he does not consider that any of the information contained in the report would be of assistance to potential law breakers. Taken together with the facts that the investigation was concluded some time ago and that no proceedings were instituted, it is clear that release of the information would not be a threat to a fair trial, and the Commissioner does not believe that release of the information would compromise future crime prevention. The Commissioner recognises that, in different circumstances, the contents of HSE's accident investigation reports and their analyses may well contain information which would pose such risks but, in this instance, he is not persuaded that this is the case.
25. It could be argued that, as the analysis does not add a great deal to the information already provided, the public interest in it is diminished. However, without the analysis there are gaps in the explanation of why HSE decided against further action, and without that information the public confidence in the thoroughness of the investigation of a serious incident would be compromised. Therefore, in all the circumstances of this case, the Commissioner finds that the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information requested.

The Decision

26. The Commissioner's decision is that the public authority did not deal with the following elements of the request for information in accordance with the Act:
- (i) HSE failed to comply with section 17(7) of the Act in that details of HSE's complaints procedures and details of the right to complain to the Commissioner were not included in the refusal notice.
 - (ii) the requested information was incorrectly withheld under section 30(1) of the Act.

Steps Required

27. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- HSE to provide to the complainant the information requested in relation to the analysis of the investigation report.
28. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

29. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

30. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 18th day of February 2008

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Refusal of a request

Section 17(7) provides that:

“A notice under subsection (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Investigations and proceedings conducted by public authorities.

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of -

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained -
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”