

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2022

Public Authority: Health and Safety Executive Northern Ireland
Address: 83 Ladas Drive
Belfast
BT6 9FR
Northern Ireland

Decision (including any steps ordered)

1. The complainant has requested information relating to non-compliance with the Supply of Machinery (Safety) Regulations 2008.
2. The Health and Safety Executive for Northern Ireland (HSENI) refused to disclose the information, citing section 31(1)(g) (law enforcement) and section 40(2) (personal information) of FOIA.
3. The Commissioner's decision is that the withheld information engages section 31(1)(g) and the public interest lies in maintaining the exemption.
4. The Commissioner has also decided that HSENI is entitled to withhold the personal information requested under section 40(2).
5. The Commissioner does not require the public authority to take any steps.

Request and response

6. On 20 November 2020, the complainant wrote to HSENI and requested information in the following terms:

“Any written policy or guidance document in force during the course of the last 2 years concerning the compliance of machinery sold for use in Northern Ireland with either:

- a. The Machinery Directive or its UK implementing legislation, The Supply of Machinery (Safety) Regulations 2008; or
- b. the ATEX Directive or the legislation which implements this in Northern Ireland, The Equipment and Protective Systems Intended for Use in Potentially Explosive Atmospheres Regulations (Northern Ireland) 2017.

2. Details of regulatory action (apart from regulatory action leading to criminal prosecution) taken in the last two years with respect to non-compliance of machinery sold for use in Northern Ireland with the legislation at 1(a) or 1(b), above.

3. Details of any regulatory action (apart from regulatory action leading to criminal prosecution) taken in the last two years with respect to non-compliance of machinery sold for use in Northern Ireland pursuant to:

- a. The General Product Safety Regulations 2005; or
- b. the market surveillance requirements of Regulation (EC) No 765/2008.

4. For the purposes of this request, “details” includes, but is not limited to, any:

- a. notices issued in respect of non-compliance of machinery with Regulations 7 or 8 of the Supply of machinery (Safety) Regulations 2008;
- b. assessment that a product is deficient with respect to CE marking pursuant to Regulation 21 of the Supply of machinery (Safety) Regulations 2008;
- c. evaluation of a product presenting a risk pursuant to Regulation 55 of the Equipment and Protective Systems Intended for Use in Potentially Explosive Atmospheres Regulations (Northern Ireland) 2017;

- d. measures ordered to undertaken by an economic operator pursuant to Regulation 58 of the Equipment and Protective Systems Intended for Use in Potentially Explosive Atmospheres Regulations (Northern Ireland) 2017;
 - e. findings of formal non-compliance pursuant to Regulation 59 of the Equipment and Protective Systems Intended for Use in Potentially Explosive Atmospheres Regulations (Northern Ireland) 2017;
 - f. any other risk assessment taken (e.g. pursuant to Article 20 of Regulation (EC) No 765/2008) with regard to the safety of machinery sold for use in Northern Ireland;
 - g. requests for information made to an economic operators in pursuance of any investigation as to whether or not machinery sold for use in Northern Ireland is safe and complies with applicable national and/or EU legislation and standards;
 - h. responses made by economic operators to requests made under 4(f); and
 - i. to the extent not otherwise covered, correspondence exchanged with any party alleged not to be in compliance with the legislation listed at 1(a) and 1(b) or 3(a) and 3(b), above.”
7. HSENI responded on 5 January 2021. It provided information in response to parts 1, 2 and 3 of the request. It provided some information in response to part 4 of the request but confirmed that correspondence with non-compliant parties – part 4(i) of the request - was being withheld under section 31(1)(g).
8. Following an internal review the HSENI wrote to the complainant on 19 March 2021. It upheld its original position.

Scope of the case

- 9. The complainant contacted the Commissioner on 14 June 2021 to complain about the way that their request for information had been handled.
- 10. The complainant expressed concern that section 31(1)(g) had been applied in a blanket manner and noted that ‘Clearly there is a balance to be struck between HSENI being able to conduct confidential correspondence and engage openly with parties in the course of investigations and the duty to disclose.’

11. During this investigation, HSENI also confirmed that it considers some information exempt under section 40(2) (personal information).
12. The Commissioner therefore considers the scope of his investigation to be to determine if the withheld information engages section 31(1)(g) and, if so, whether the public interest lies in maintaining the exemption or in disclosure. The Commissioner will also consider HSENI's application of section 40(2).

Reasons for decision

Section 31 – law enforcement

13. Section 31(1) of FOIA states:

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

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).”

14. The Commissioner considers that the phrase ‘at any time’ means that information can be exempt under section 31(1)(g) if it relates to an ongoing, abandoned or even closed investigation.

15. Section 31(2) of FOIA states:

“(2) The purposes referred to in subsection (1)(g) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g) the purpose of protecting the property of charities from loss or misapplication,

(h) the purpose of recovering the property of charities,

(i) the purpose of securing the health, safety and welfare of persons at work, and

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

16. In order to engage the exemption a public authority must:

- identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);
- confirm that the function has been specifically designed to fulfil that purpose, and
- explain how the disclosure would, or would be likely to, prejudice that function.

17. The Commissioner's guidance¹ on law enforcement states 'The function must be one which has been specifically entrusted to the relevant public authority to fulfil, and not just something that is incidental to its main functions.'

18. The functions in question, which in this case are (c), (e), (i) and (j), must be imposed upon the public authority by statute or, in the case of central government departments, by the Crown.

19. HSENI has indicated that the purposes highlighted in bold are carried out in accordance with its obligations under the Supply of Machinery (Safety) Regulations 2008² ('the Regulations').

¹ [law-enforcement-foi-section-31.pdf \(ico.org.uk\)](http://ico.org.uk/law-enforcement-foi-section-31.pdf)

² [The Supply of Machinery \(Safety\) Regulations 2008 \(legislation.gov.uk\)](http://legislation.gov.uk/The Supply of Machinery (Safety) Regulations 2008)

20. HSENI has explained to the Commissioner that enforcement of the Regulations is shared between the Health and Safety Executive in Great Britain and HSENI in Northern Ireland.
21. Schedule 5, paragraph 4³ of the Regulations specifically designates HSENI as the regulatory authority in relation to Northern Ireland and Schedule 9 outlines HSENI's enforcement powers.
22. The Commissioner is satisfied that HSENI has a statutory duty to carry out the functions listed at (c), (e), (i) and (j) and that those functions have been specifically designed to fulfil said obligations.
23. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
24. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
25. As part of his investigation, HSENI has provided the Commissioner with a copy of the withheld information. It is email correspondence between HSENI and the alleged non-compliant parties ('dutyholders') referred to in the request.

³ [The Supply of Machinery \(Safety\) Regulations 2008 \(legislation.gov.uk\)](http://legislation.gov.uk)

The applicable interests

26. HSENI considers that the disclosure of the withheld information “would be likely to “prejudice those matters mentioned in subparagraphs of section 31(2), referred to at paragraph 4 above in the exercise of its functions under the Supply of Machinery (Safety) Regulations 2008.”
27. HSENI is clearly concerned that disclosure would be likely to prejudice its ability to carry out its functions in relation to the Regulations. The Commissioner is satisfied that the first criteria as outlined in paragraph 23 has been met.

The prejudice test

28. HSENI has explained that ‘If details of correspondence with dutyholders, subject to regulatory action, were disclosed to the public on foot of an FOI request (including information voluntarily supplied by dutyholders to HSENI) this would be likely to have a detrimental impact on the willingness of these particular persons/companies, or other dutyholders who find themselves in a similar position in the future, to voluntarily and collaboratively engage with HSENI.’
29. HSENI is concerned that reluctance to engage with the regulator would significantly inhibit its ability to gather information and discharge its regulatory functions.
30. HSENI has elaborated that, whilst it does possess powers to compel dutyholders to provide information or cooperate with any investigation, ‘if it were forced to deploy such powers in every case it would be likely to find itself receiving less information and be administratively mired in overly bureaucratic procedures.’ As a result, HSENI is concerned that it would be able to deal with a fewer number of regulatory interventions and ‘All of this would be likely to prejudice its ability to function effectively as a regulator and to fulfil its statutory functions.’
31. The Commissioner accepts this argument. Whilst formal means of gathering information can be employed by HSENI when absolutely necessary, it will be more effective and efficient if dutyholders provide this information voluntarily. HSENI relies upon open and candid relationships with dutyholders in order to avoid using its formal powers in every instance. HSENI is concerned that disclosure would compromise this relationship.
32. Ultimately, HSENI is concerned because it regulates over 64,000 workplaces. It considers that If the withheld information were disclosed under FOIA and even a small fraction of workplaces altered their behaviour, there would be a real and significant impact on the ability of HSENI to carry out its statutory functions.

The likelihood of the prejudice

33. A prejudice based exemption such as section 31 must be engaged on either the basis of 'would' or 'would be likely to'. These terms have separate and distinct meanings in this context.
34. The higher threshold of prejudice is defined by the Commissioner's guidance⁴ as 'the chain of events is so convincing that prejudice is clearly more likely than not to arise.' The chance of prejudice has to be significant to engage this higher threshold of prejudice and greater than 50%.
35. HSENI has confirmed to the Commissioner that it has applied the exemption on the basis of the lower threshold of prejudice, that disclosure 'would be likely' to result in prejudice.
36. The lower threshold is defined in the Commissioner's guidance as 'there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.'

Is the exemption engaged?

37. Having reviewed the withheld information, the Commissioner considers it all engages section 31(1)(g) by virtue of section 32(1)(c), (e), (i) and (j).
38. To reiterate, the withheld information is correspondence exchanged between HSENI and dutyholders in relation to non-compliance with Regulations 7 or 8 of the Regulations. The complainant is concerned that there has not been any attempt by HSENI to differentiate between correspondence exchanged for administrative purposes (for example to confirm the outcome of an investigation) and correspondence that contains any intelligence necessary for HSENI to reach its conclusion.
39. The Commissioner acknowledges the complainant's view. However, section 31(1)(g) is clear, information held by a public authority is exempt information if it has at any time been held by the authority for the purposes specified in subsection (2). To the Commissioner, it is clear that all of the withheld information is held by HSENI for the purpose of fulfilling its functions listed at (c), (e), (i) and (j).
40. Furthermore, HSENI's argument is that disclosure would be likely to undermine the open and candid relationship between it and dutyholders

⁴ [the prejudice test.pdf \(ico.org.uk\)](https://ico.org.uk/the-prejudice-test.pdf)

which, in turn, would be likely to prejudice its effectiveness as a regulator. Disclosure of any of the withheld information, either administrative or substantive, has the potential to identify the dutyholder and deter voluntary engagement with the regulator.

41. HSENI has highlighted that 'each regulatory action, contained within the withheld information, was resolved to HSENI satisfactory without the need for formal enforcement action or prosecution.' The Commissioner accepts that it would be likely to discourage voluntary engagement with HSENI to see information exchanged for the purposes of establishing compliance disclosed to the world at large – especially when no further action was deemed necessary.
42. To reiterate, the lower threshold represents a more than hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
43. The complainant is concerned that the outcomes of any investigations that HSENI conducts should be a matter of public record or should 'surely be a matter of public record and fully disclosable under FOI.'
44. The Commissioner notes that HSENI proactively publishes details of its prosecutions under the Regulations. However, it does not publish details in which no further action was necessary which is the case in relation to the withheld information.
45. Since the Commissioner has established that the exemption is engaged he will move onto consider where the public interest lies, in maintaining the exemption or disclosure.

The public interest

Public interest arguments in favour of disclosure

46. HSENI acknowledges that there is a general public interest in ensuring that it is transparent about its processes and decision making and accountable to the public.
47. It also acknowledges that there is a public interest in demonstrating that its dutyholders are efficiently regulated. Disclosure would help to build public confidence in HSENI and its investigative processes.
48. HSENI recognises that disclosure would act as a 'means of allowing people to determine whether HSENI has acted appropriately and is discharging its statutory functions.'

Public interest arguments in favour of maintaining the exemption

49. HSENI is concerned that disclosure would be likely to have an adverse effect on the voluntary supply of information between itself and its dutyholders and damage the open and candid relationship between these parties.
50. In turn, this would impede ongoing or future investigations which HSENI notes would not be in the public interest. HSENI is also concerned that a lack of engagement from its dutyholders would reduce the chances of a successful prosecution should the investigation move in that direction.
51. HSENI has also indicated that 'no formal enforcement action was taken against any of the dutyholders contained in the withheld information' and therefore disclosure would be unfair.

The balance of the public interest

52. In this instance, the Commissioner has determined that the public interest lies in maintaining the exemption.
53. There is an undeniable public interest in ensuring that machine manufacturers comply with the Regulations and, in turn, keep employees across Northern Ireland safe. Disclosure of the withheld information would provide insight into how HSENI handles allegations of non-compliance, how it carries out its investigation and when it considers enforcement action appropriate.
54. However, the Commissioner has assigned considerable weight to preserving HSENI's ability to perform its statutory functions as robustly and effectively as possible. The Commissioner is mindful that it is HSENI's role to encourage, regulate and enforce workplace health, safety and welfare. Clearly, it is not within the public interest to dilute HSENI's ability to perform these tasks.
55. The Commissioner is also mindful that each dutyholder to whom the withheld information relates has been investigated by HSENI who has determined that no further action is necessary. If any of the dutyholders in question were found to be non-compliant this would strengthen the argument for disclosure, since it is within the public interest to protect the public from any unsafe workplaces. However, this is not the case.
56. The Commissioner concurs with HSENI when it says there is 'a greater public interest in maintaining the exemption, thus ensuring it remained an effective regulator with whom dutyholders are prepared to engage with both voluntarily and candidly.' Having reviewed the withheld information, the Commissioner can see just how much HSENI relies on dutyholders volunteering information.

57. The Commissioner is also mindful that any advice HSENI has developed off the back of correspondence with the dutyholders has also been placed on its website, for the benefit of all those whose working environments involves the use of the same or similar machinery.

Section 40 – personal information

58. HSENI has explained that third party data is contained within the withheld information and 'The information ranges from names and contact details to personal opinions and accounts relating to incidents being investigated. The information also contains sensitive information relating to injured employee's.'

59. Section 40(2) of the FOIA states:

"Any information to which a request for information relates is also exempt information if-

- (a) It constitutes personal data which does not fall within subsection (1), and
- (b) The first, second or third condition below is satisfied."

Subsection (1) refers to exempt information that constitutes personal data of which the applicant is the data subject.

60. In this instance the relevant condition is contained in section 40(3A)(a) which states:

"The first condition is that the disclosure of the information to a member of the public otherwise than under this Act-

- (a) Would contravene any of the data protection principles."

61. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA18'). If this is not the case then section 40 cannot be used as a basis for refusing to disclose the information.
62. Secondly, and only if the Commissioner is satisfied that the requested information constitutes personal data, he must establish whether disclosure of that information would breach any of the data protection principles.

Is the requested information personal data?

63. Part 1, Section 3(2) of the DPA18⁵ defines personal data as:

“any information relating to an identified or identifiable living individual.”

64. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable from that information.

65. 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.

66. An identifiable living individual is one who can be identified, either 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.

67. The Commissioner notes that the withheld information contains descriptions of injuries that employees sustained and accounts relating to incidents being investigated. The accounts of injuries or incidents being investigated do not contain the name of any individuals involved, they refer to ‘injured parties.’ However, the Commissioner must consider if the injured party can still be identifiable from this information.

68. When someone is injured in the workplace, this is likely to create interest and curiosity and the Commissioner must be mindful that disclosure under FOIA is disclosure to the world at large. If the identity of any injured party were to be confirmed through the disclosure of information under FOIA, this would count as re-identification. In one extract, the name of the workplace is discussed alongside the injuries of the injured party. To the Commissioner, it is reasonable to assume that a colleague of the injured party may be able to identify who they are from the disclosure of this information.

69. However, the Commissioner is not sure how re-identification would occur in all of the excerpts that HSENI is referring to. For example, some excerpts just discuss the injured party without any reference to their workplace. The Commissioner notes that the dutyholders to whom the withheld information relates are suppliers of machinery, not workplaces, who are likely to supply machinery to multiple businesses.

⁵ [Data Protection Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)

70. As it says, HSENI regulates over 64,000 workplaces. The Commissioner does not consider that it would be possible to identify the individual involved in an accident, from either the description of their injuries or an account of the incident, given that they are not named.
71. Therefore, even though all of the descriptions of injuries and accounts of incidents relate to individuals, the Commissioner disagrees that all of these excerpts allow individuals to be identified. Therefore section 40(2) is not engaged in relation to some information but the Commissioner is satisfied that it can be withheld under section 31(1)(g) for the reasons discussed above.
72. Having studied the withheld information, the Commissioner notes that it contains the names and contact details of staff both from HSENI and the dutyholders with whom it is corresponding. Since names both relate to and identify third parties, they fall within the definition of 'personal data' as outlined above.
73. The fact that information constitutes personal data does not automatically exclude it from disclosure under FOIA. The Commissioner must now consider whether disclosure of the requested information would contravene any of the data protection principles.

Is the information special category data?

74. Information relating to the data subject's health, including injuries at work, is classed as special category data which requires special protection. Special category data is particularly sensitive and therefore warrants special protection. It cannot be processed (including disclosure under FOIA) unless one of the strict conditions listed in Article 9 of the UK GDPR can be met.
75. The Commissioner considers that the only conditions in Article 9 that could allow the disclosure of special category personal data under FOIA are:
 - a) the data subject has given explicit consent to the disclosure;
 - e) the personal data in question has been manifestly made public by the data subject.
77. The Commissioner has seen no evidence or indication that the injured parties concerned have explicitly consented to this data being disclosed under FOIA. The Commissioner is also not aware of any evidence which shows that the injured parties have deliberately made this data public at the time of the request.
78. As none of the conditions required for processing special category data are satisfied, disclosing the information relating to the injured parties

would breach principle (a) and so this information is exempt under section 40(2) of FOIA.

76. The Commissioner will now move onto consider the personal data that is being withheld that does not represent special category data. The most relevant data protection principle in this case is principle (a) which states that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"⁶.

Would disclosure contravene principle (a)?

77. Personal data is processed when it is disclosed in response to the request. This means that a public authority can only disclose personal data in response to an FOI request if to do so would be lawful, fair and transparent.
78. In order to be lawful, one of the lawful bases listed in Article 6(1)⁷ of the UK General Data Protection Regulation (UK GDPR) must apply to the processing.

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

79. 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."
80. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made under the FOIA, it is necessary to consider the following three-part test:
81. **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;

⁶ [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](#)

⁷ [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](#)

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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

Legitimate interest test

82. The Commissioner must first consider the legitimate interest in disclosing the personal data to the public and what purpose this serves. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be the requester's own interests as well as wider societal benefits. These interests can include the broad principles of accountability and transparency that underpin FOIA, or may represent the private concerns of the requestor.
83. It is important to remember that disclosure under the FOIA is effectively disclosure to the world at large. The Commissioner is of the opinion that, if the requester is pursuing a purely private concern which is unrelated to any broader public interest then disclosure is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).
84. HSENI does not believe that there is a legitimate interest being pursued in this request for information but the Commissioner disagrees.
85. It is clear that the complainant has concerns about compliance with the Regulations. The complainant's legitimate interest may have partially been met by HSENI's response to part 2 of the request which explains that 'In the period referred to, HSENI have dealt with approximately 38 machinery investigations. HSENI worked with the economic operator, namely the importer/manufacturer to ensure either the necessary work was carried out on the design of the product to achieve compliance with the supply of machinery regulations 2008, or administratively carrying out actions to remove formal non-compliance with the directive / regulation. These were all resolved through cooperation / joint working with the duty holders and without the need to move to formal enforcement.'
86. It is not clear if the complainant is an injured party or representing an injured party. Nevertheless, they have specifically requested the copies of correspondence between HSENI and the dutyholders alleged not to be in compliance with the Regulations.

87. With the above in mind, the Commissioner is satisfied that there is a legitimate interest in disclosure of this information.

Necessity test

88. The Commissioner must also consider if disclosure is necessary for the purpose that this legitimate interest represents or if there is an alternative method of doing so.

89. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure under FOIA is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.

90. The Commissioner does not consider it necessary for the names and contact details of HSENI staff to be disclosed. If any individual wishes to make an allegation, or raise a concern, about a dutyholder they may do so through HSENI's reporting tool⁸ rather than to a member of staff directly.

91. The Commissioner has considered the names and the contact details of the dutyholders that are currently being withheld. Whereas HSENI staff all represent the Executive, there may be instances in which a specific member of staff at a dutyholder is responsible for an allegation under the Regulations. Furthermore, there might be a specific dutyholder, or individual, with whom the complainant is concerned.

92. Again, the Commissioner is not convinced that it is necessary to disclose this information as any concerns about a dutyholder should be raised with HSENI by the route above. However, for the sake of completeness he will go onto conduct the balancing test.

Balancing test

93. The Commissioner will now go onto consider whether the identified interests in disclosure outweigh the interests or fundamental rights and freedoms of the data subject. To reiterate, this balancing test just relates to the names of the staff of the dutyholders being investigated.

94. If the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

⁸ [Complaint Case Details \(hseni.gov.uk\)](https://www.hseni.gov.uk)

95. In performing this balancing test, the Commissioner has considered the following
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
96. In the Commissioner's view, the balancing test should take into account whether the data subjects' concerned have a reasonable expectation that their information would not be disclosed. This expectation may be influenced by a number of factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose which this personal information serves.
97. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
98. The information being requested relates to allegations of non-compliance with the Regulations. It includes details of injuries sustained by injured parties, details of machinery and discussions between dutyholders and HSENI. With this in mind, the Commissioner believes that disclosure of the dutyholder's personal data, without their knowledge or consent, would cause distress.
99. Disclosure would place into the public domain not only their name but the name of the business they represent, in relation to an allegation of potentially dangerous and harmful machinery. It could even cause reputational damage. The Commissioner has weighed up these repercussions against the fact that enforcement action was not taken against any of the dutyholders in question.
100. Furthermore, the Commissioner does not consider it would be in the reasonable expectation of the individuals involved that their personal data would be disclosed in this manner. When HSENI investigates a dutyholder it uses the information it gathers for that purpose only, including taking enforcement action if required.
101. Again, the Commissioner considers it relevant that no enforcement action was taken against the dutyholders in question. Whilst there have been allegations made, these have been addressed by HSENI who has determined that no further action is necessary.

102. Furthermore, if a complainant is dissatisfied with the outcome of their complaint to HSENI they may escalate their complaint.⁹ Firstly they would escalate their complaint to HSENI's Head of Services Division. If the complainant still remains dissatisfied they can escalate their concern again to HSENI's Chief Executive. If they still remain dissatisfied after that they can raise their concern with the Ombudsman.
103. Given HSENI's extensive complaints procedure, the Commissioner considers that disclosure of the names and contact details of the dutyholder's staff would be disproportionately intrusive to the individuals involved. Especially since these individuals corresponded with HSENI for the purposes of assisting voluntarily with an investigation which was then closed without the need for enforcement action.
104. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate. In this case, the Commissioner does not consider disclosure proportionate.
105. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
106. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to consider whether disclosure would be fair or transparent.
107. The Commissioner has decided that HSENI was also entitled to withhold some of the requested information under section 40(2), by way of section 40(3)(a).

⁹ [Complaints about HSENI | Health and Safety Executive Northern Ireland](#)

Right of appeal

108. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

109. 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.

110. 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

Alice Gradwell
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