

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2022

Public Authority: Health and Safety Executive
Address: Redgrave Court
Merton Road
Bootle
Merseyside
L20 7HS

Decision (including any steps ordered)

1. The complainant requested a copy of an investigation report. The Health and Safety Executive ("the HSE") withheld the report and relied on section 30 of the FOIA (investigations) in order to do so.
2. The Commissioner's decision is that the withheld information engages section 30 of the FOIA and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On a date prior to 21 January 2021, the complainant wrote to the HSE and requested information in the following terms:
"Please supply me with a copy of the final Health and Safety Executive report relating to the investigation of [address redacted]."
5. The HSE responded on 21 January 2021. It confirmed that it held the requested information, but relied on section 30 of the FOIA to withhold it.
6. The complainant sought an internal review on the same day. The HSE had not completed an internal review at the point the Commissioner commenced his investigation or at the date of this notice.

Scope of the case

7. The complainant contacted the Commissioner on 10 March 2021 to complain about the way his request for information had been handled. At that point, the HSE had yet to complete its internal review.
8. Despite an informal intervention from the Commissioner, the HSE failed to complete its internal review within a reasonable period, so the Commissioner exercised his discretion and accepted the case without waiting for the HSE to complete its review.
9. The Commissioner began his investigation on 18 August 2021 with letters to both parties. Given that the complainant had made two other complaints relating to the same HSE investigation, the Commissioner considered that it would be more practical to deal with all three cases simultaneously. The HSE did not indicate that this approach would be more burdensome.
10. When submissions failed to materialise by the deadline, the Commissioner sent chasing correspondence on 20 September and 30 September. The HSE issued a brief holding response on 1 October and a further response on 7 October. It stated that it intended to provide a submission in respect of one of the complaints by 15 October, but did not mention any of the other complaints – despite being asked to do so.
11. On 21 October, having failed to receive any submissions or any indication of when submissions might be forthcoming, the Commissioner issued information notices in respect of all three complaints requiring the HSE to provide him with the information he required to reach his decision. The HSE complied with the information notice relating to this cases on 2 November 2021. No apology or explanation for the delay was offered.
12. The Commissioner has made further comment on the HSE's engagement under the "other matters" section of this notice.
13. The Commissioner considers that the scope of his investigation is to determine whether the HSE has correctly applied section 30 of the FOIA to the withheld information.

Reasons for decision

14. Section 30(1) of the FOIA states 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

15. Section 30 of the FOIA is a class-based exemption – meaning that all documents of a particular type will be covered by the exemption. There is no requirement to demonstrate that disclosure might be harmful.

16. The withheld information comprises of a report extracted from HSE's case management system relating to its investigation into work that was carried out at the complainant's home.

17. The report details the steps taken by HSE to establish whether an unregistered engineer had carried out gas work at the property without the supervision of a registered engineer and, if so, whether either of the two individuals had committed an offence under the Health and Safety at Work Act 1974 and the Gas Safety (Installation and Use) Regulations 1998.

18. To engage this exemption, it is not sufficient for a public authority to merely carry out an investigation. The investigation must be carried out with a view to "ascertaining" whether a person should be charged with an offence. The Commissioner considers that the word "ascertaining" means more than just providing an opinion or recommendation. It implies that the public authority should have the power to begin a prosecution against that individual, should the circumstances warrant it.

19. The Commissioner is satisfied that the HSE has appropriate powers to investigate and prosecute people for breaching the Health and Safety at Work Act and for breaching regulations arising out of that Act. It therefore does not just carry out investigative work, it also has the necessary powers to "ascertain" whether an individual should be charged with an offence.

20. The report covers the gathering of evidence and witness statements from various individuals. It also includes the internal thinking of HSE employees as they assess the evidence to determine whether there is a realistic prospect of a successful prosecution.

21. The Commissioner is therefore satisfied that the HSE held this information for the purposes of an investigation to ascertain whether two individuals should be prosecuted for criminal offences. It follows that section 30 of the FOIA is engaged.

Public interest test

22. Section 30 is a qualified exemption – meaning that even if information is held for the purposes of an investigation, it must still be disclosed unless the balance of the public interest favours maintaining the exemption.
23. Given the relatively broad nature of the exemption and the fact that it is class-based, there will always be an inherent public interest in maintaining the exemption. The strength of that interest will depend on the withheld information and the circumstances that prevailed at the time of the request.
24. When asked to list the public interest factors it had considered in favour of disclosure, the HSE responded to say:

"Transparency and accountability"

25. The Commissioner would note that there is a public interest in understanding how the HSE carries out its investigative work and how it makes decisions as to whether an individual should be prosecuted or not.
26. In this case, the HSE had completed its investigation and decided not to prosecute either of the individuals in question. There is thus arguably a slightly stronger public interest than usual in understanding why and how the HSE reached that decision.
27. In explaining why the balance of the public interest should favour maintaining the exemption, the HSE argued that:

"Although HSE have powers under the Health and Safety at Work Act 1974 to seize information from those under investigation, our inspectors prefer to obtain information on a voluntary basis. This generally provides HSE with much greater information and we would wish to continue to operate in this way as this way of working supports the overall public interest. HSE are concerned the inappropriate disclosure of our investigation report into the public domain in response to [the complainant's] request would not serve the overall public interest as dutyholders would be less willing to volunteer information to HSE if they feared it was going to be disclosed inappropriately. This is particular relevant if those under investigation have been found not to have failed health and safety legislation. HSE do recognise however that there are times when

there is an overwhelming public interests supporting disclosure of our investigation material but this is usually the case when an investigation involves multiple injured persons and poor health and safety operations by large dutyholders that impact on their employees and members of the public.

"HSE are of the view disclosure of the information requested by the complainant would only serve his private interests and would not serve the overall public interest at this time. This is because HSE did not take any enforcement action against [the individuals]. It is therefore likely disclosure of our investigation report into the public domain would cause detriment to [the individuals]. This would be unfair as they are likely to be portrayed in the public arena as being responsible for failing to comply with the law when they were not and such disclosure is likely to impact on HSE's future consultation with [the individuals]. They are unlikely to offer information in the future on a voluntary basis and this is likely to impact on our ability to enforce health and safety legislation and would ultimately not be in the overall public interest."

The Commissioner's view

28. The Commissioner's view is that the balance of the public interest favours maintaining the exemption.
29. The Commissioner accepts that organisations with functions to investigate and prosecute criminal offences rely on the voluntary co-operation of victims and witnesses – as well as those under investigation. Whilst those bodies usually have enforcement powers to require information to be provided, these are most effective when used sparingly and it is important not to obstruct the voluntary flow of information.
30. Whilst it is not clear why the HSE would need to engage further with the individuals in question (the registered and unregistered engineer) given that the investigation is now closed, the Commissioner recognises that others will find themselves in a similar position in future and should not be dissuaded from cooperating.
31. Disclosure of the withheld information would risk creating a false impression as to what the individuals had done and might imply that they were guilty of wrongdoing – despite no such finding having been made.
32. Furthermore, the Commissioner notes that the original wording of the request named the complainant's home address. That might enable the

complainant's neighbours to identify some of the people involved in the investigation and link those people to the evidence they provided.

33. Finally, the Commissioner considers that, even if section 30 did not apply, the amount of redaction that would be necessary to remove any personal data (and particularly criminal offence personal data) would render the remaining information so incomplete as to be potentially misleading.
34. This particular incident was not a large-scale incident. The Commissioner considers that whilst the complainant clearly has a strong private interest in the matter, it serves no broader public interest. Conversely there is a very strong public interest in allowing the HSE to gather the information it needs to enforce health and safety legislation.
35. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption.

Other matters

36. The Commissioner recognises that almost all public authorities have experienced increased difficulties in meeting their statutory obligations to provide information during the Covid-19 pandemic. HSE in particular informed the Commissioner during the summer that it was struggling both in terms of increased volumes and reduced capacity.
37. As a reasonable and proportionate regulator, the Commissioner is always willing to work with any public authority to minimise the burden of dealing with requests and complaints to his office. He is usually willing to extend deadlines – particularly when the public authority is able to offer a reasonable timetable for providing its response.
38. However that pragmatic approach is contingent on him receiving meaningful engagement with the public authority in question.
39. In this case, the Commissioner notes that it took almost four months to get the HSE to provide its submission. His own deadlines were ignored, the HSE was not willing to suggest any timetable for providing its responses and, the one time that it did set itself a deadline, it failed to meet it. Only when threatened with the prospect of being found in contempt did the HSE finally provide its response.
40. The Commissioner considers the HSE's engagement with his office on this case to have been unacceptably poor and he expects to see improvements when future complaints are allocated for investigation.

Timeliness

41. Whilst there is no statutory time limit for carrying out an internal review, the Commissioner considers that they should usually be completed within 20 working days and should never take longer than 40 working days.
42. In this case, the Commissioner notes that the HSE had not completed its internal review, despite his earlier intervention, some ten months after the review was first requested. He considers this to be extremely poor practice.
43. As no definitive evidence has been produced which demonstrates the date on which the request was made, the Commissioner has not been able to determine whether the HSE's procedural handling of this request amounted to a statutory breach. However, the Commissioner notes that this request was responded to on the same day as the HSE responded to another request, made by the same individual, relating to the same matter, in October 2020. He also notes that he has dealt with a number of complaints about delayed responses from the HSE
44. The Commissioner considers it unlikely that the HSE would have issued its refusal notice within 20 working days. However, without proof of when the request was made, he cannot find a breach of section 17 of the FOIA.

Right of appeal

45. 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

46. 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.
47. 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

Roger Cawthorne
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