

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date:** 11 May 2010

**Public Authority:** Health and Safety Executive  
**Address:** Redgrave Court  
Merseyside  
L20 7HS

### Summary

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The complainant requested a copy of the public authority's report into a fatal accident, and other information relating to the associated investigation. The public authority refused to provide the requested information on the grounds that it was exempt under section 30(1) of the Freedom of Information Act 2000 (the "Act") and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner has investigated and concluded that the public authority correctly refused the requests on the basis that the information was exempt under section 30(1). He therefore requires no further steps to be taken in respect of this request. The Commissioner has, however, noted a number of procedural breaches of the Act.

### The Commissioner's Role

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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 Act. This Notice sets out his decision.

### The Request

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2. On 11 December 2008 the complainant wrote to the Health and Safety Executive (the "HSE") and requested information

concerning the fatal accident of a named individual at work.  
The complainant specifically asked to be provided with:

"...your report...with any accompanying statements,  
photographs, etc".

3. The HSE responded on 12 January 2009. It explained that the matter was "still ongoing" and refused to provide any of the requested information. Further, the HSE explained that it would be unable to provide any information for several months as the completed report would, "at the first instance be considered by the CPS [Crown Prosecution Service]".
4. On 2 March 2009 the complainant contacted the HSE and repeated its request. The complainant stated that, "for the avoidance of doubt [the request had been] made under the Freedom of Information Act 2000 and the Data Protection Act [1998]". The complainant also made further requests for the following information:

"In the circumstances we would be grateful to receive:

1. your report (if available)
2. details of witnesses / their statements
3. other relevant information that you hold

In addition we would be grateful if you could please confirm that you have interviewed [first named individual] who we understand was at the scene of [second named individual's] death. We would be grateful if you could please confirm [first named individual's] family name. Please also confirm whether [first named individual] was interviewed alone and/or in the company of others. If [first named individual] was interviewed in the company of others please confirm who.

Our client is also anxious to establish whether the domestic dwelling where the accident occurred was in anyway connected to [third named individual], [second named individual's'] previous employers."

5. On 5 March 2009 the HSE wrote to the complainant and explained that Thames Valley Police were leading the investigation into the death and so it directed the complainant to write to that organisation.
6. The complainant requested an internal review of the HSE's handling of the case on 7 April 2009.

7. On 27 April 2009 the HSE wrote to the complainant with the outcome of the internal review. The HSE confirmed it held information that was relevant to the requests, however it refused to provide the information on the basis that section 30(1) of the Act applied, and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

## **The Investigation**

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### **Scope of the case**

8. On 15 June 2009 the complainant contacted the Commissioner to complain about the way the requests for information dated 2 March 2009 had been handled. The complainant specifically asked the Commissioner to consider the HSE's refusal to provide the information it had requested in full.
9. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### **Chronology**

10. On 7 August 2009 the Commissioner wrote to the HSE and explained that he had received this complaint under section 50(1) of the Act. Following receipt of this letter the HSE wrote to the Commissioner, on 14 August 2009, and further explained its handling of the requests.
11. On 22 October 2009 the Commissioner contacted the HSE to clarify the scope of his investigation and to ascertain exactly what information was held that fell within the scope of the requests. The HSE confirmed that it would provide the Commissioner with a schedule of the information it held which fell within the scope of the requests.
12. On 30 October 2009 the HSE provided the Commissioner with a schedule of information it held that was within the scope of the requests. This has been attached as a confidential annex to this Notice.

## Analysis

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### Exemptions

13. The HSE cited "section 30(1)" as the relevant exemption for withholding the requested information, but failed to specify which subsection it was relying upon. However, the Commissioner has recently investigated a similar case involving the HSE (which did not proceed to a Decision Notice) in which it cited section 30(1)(b). The Commissioner considers this exemption to be appropriate to this particular case.
14. The Commissioner has therefore considered whether section 30(1)(b) is engaged in respect of the withheld information.
15. 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 –

  - (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..."
16. The withheld information is held by the HSE for the purposes of its investigation into the fatality which was ongoing at the time of the request. Depending upon the outcome of the investigation, criminal charges may have been brought following its conclusion.
17. The Commissioner is satisfied that, at the time the request was made, the information requested was held as part of an investigation being conducted by the HSE, with the potential for criminal proceedings to be instituted following the conclusion of that investigation. He therefore considers the section 30(1)(b) exemption to be engaged in respect of the withheld information.

### Public interest arguments in favour of disclosing the requested information

18. The complainant has made a number of arguments in favour of disclosing the requested information. The complainant

argued that disclosure was necessary to ensure that the victim's dependants could bring a civil claim. It explained that, in the specific circumstances of this case, it would be difficult to pursue such a claim in the absence of the requested information because it is unclear where liability rests. Furthermore, it argued that it was not possible to obtain information from HSE under the Civil Procedure Rules (CPR) because the CPR do not provide for orders for pre-action disclosure against third parties. When determining whether a public authority should disclose information in response to a request, the issue is whether it is in the public interest to disclose that information to the public at large. The Commissioner has noted the complainant's arguments as set out previously but does not consider them to be relevant here because they relate to the private interests of the victim's dependants as opposed to the public interest in disclosure.

19. The Commissioner has however taken into account the complainant's argument that there is a public interest in disclosing evidence which may show that the health and safety of an individual has been endangered.
20. In addition, the Commissioner has identified the following additional arguments in favour of disclosure. There is a public interest in increasing the public's understanding of how the HSE conducts its investigations. There is also a public interest in ensuring that the HSE is accountable for its actions in relation to the investigation and transparent about the way that it is conducted.

### **Public interest arguments in favour of maintaining the exemption**

21. The HSE made a number of arguments in favour of maintaining the exemption. The Commissioner has summarised these below:
  - the public interest in allowing the HSE as a regulatory body to conduct investigations thoroughly, effectively and free from the public gaze;
  - the public interest in ensuring that any prosecution brought is not prejudiced.
22. In addition, the Commissioner considers the following general arguments in favour of maintaining the exemption referenced in the case of *Digby-Cameron v ICO and Bedfordshire Police and Hertfordshire Police* (EA/2008/0023 & 0025) to be

relevant in this case. In the aforementioned case the Tribunal stated that in considering the public interest test, the starting point is to focus on the purpose of the relevant exemption. The Tribunal asserted that the general public interest served by section 30(1) is the effective investigation and prosecution of crime, which inherently requires, in particular:

- the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
- the maintenance of independence of the judicial and prosecution processes;
- preservation of the criminal court as the sole forum for determining guilt.

### **Balance of the public interest arguments**

23. In *Toms v Information Commissioner (EA/2005/0027)*, the Tribunal stated, with regard to the public interest in relation to section 30(1), that, “in striking the balance of interest, regard should be had, *inter alia*, to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested” (paragraph 8).
24. As explained above, the complainant made a number of arguments in favour of releasing the withheld information which were linked to the private interests of the dependents of the deceased. When making such arguments the complainant submitted that steps could be taken to ensure that any civil claim brought did not prejudice any criminal action. The Commissioner considers this to be an acknowledgement by the complainant that disclosure of the requested information, without restriction, could prejudice any criminal prosecution arising from the HSE’s investigation. Whilst section 30 does not require consideration of the ‘prejudice’ test for the exemption to be engaged (unlike section 31), the potential prejudice that may be caused to an investigation is a relevant consideration for the purpose of the public interest test.
25. The Commissioner has had regard to the fact that the HSE’s investigation into the accident was ongoing at the time of the requests and concerned a relatively recent accident. There is no evidence that the investigation has been delayed for any

reason; merely that it is taking some time as due process in this matter must be followed.

26. In the Commissioner's view, the arguments in favour of maintaining the exemption deserve very significant weight in this case. This is in part due to the fact that the investigation was ongoing at the time of the requests and therefore in the Commissioner's view disclosure would likely have resulted in considerable disruption to the process. It is also because much of the withheld information represents key evidence central to the investigation in question such as witness statements.
27. The Commissioner has also been mindful of the fact that HSE conducts numerous investigations into accidents at work, including those as severe as this incident. He recognises that such investigations would be severely harmed if witnesses were dissuaded from coming forward or being as free and frank as possible with HSE and that such prejudice would be likely to arise on a reasonably frequent basis.
28. Finally in attributing weight to the factors in favour of maintaining the exemption the Commissioner has taken into account the sensitivity of the matter under investigation. There is considerable public interest in a matter such as the death of an individual at work being investigated as thoroughly and efficiently as possible and ensuring that the best evidence is available to the HSE to inform its decisions.
29. Turning to the arguments in favour of disclosure, the Commissioner notes that some general information regarding the processes adopted by the HSE when investigating serious or fatal accidents is available on its website. This goes some way to addressing the public interest in understanding the procedures for conducting such investigations and ensuring transparency and accountability. However, the Commissioner also notes that no information about the specific investigation of interest to the complainant appears to be available in the public domain. Therefore, the withheld information would add to the public's understanding of the actions of the HSE in respect of this particular investigation. It would also ensure that HSE is held to account for this particular investigation and that there was greater transparency about the actions taken to date. In view of this the Commissioner considers that the arguments in favour of releasing the withheld information deserve some weight.

30. However, whilst the arguments in favour of disclosure are deserving of some weight, in the Commissioner's view the arguments in favour of maintaining the exemption have far more weight for the reasons given above. Therefore the Commissioner has concluded that HSE appropriately refused the requests on the basis that section 30(1)(b) applied and the public interest favoured maintaining the exemption.

## **Procedural Requirements**

### **Time for Compliance**

31. The Commissioner has considered whether the HSE dealt with the complainant's requests within the time for compliance, in this case twenty working days.
32. Section 10(1) provides that –
- “Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”
33. The requests for information were made on 2 March 2009. The HSE did not explicitly confirm that it held the requested information until 27 April 2009. It therefore breached section 10(1) of the Act by failing to confirm whether it held the requested information within twenty working days of receipt of the request.

### **Refusal of Request**

34. The Commissioner has considered whether the refusal notice issued by the HSE met with the requirements of the Act.
35. Section 17(1) provides that –
- “A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –
- (a) states that fact,
  - (b) specifies the exemption in question, and



- (c) states (if that would not otherwise be apparent) why the exemption applies."

36. Section 17(7) provides that –

"A notice under section (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."

37. The response provided to the complainant dated 5 March 2009 did not confirm whether the requested information was held, nor did it cite any applicable exemption. HSE also failed to communicate the details of its complaints procedure to the complainant in its response. As HSE did not provide the complainant with a notice which confirmed its reasons for withholding the requested information until 27 April 2009 it breached section 17(1) of the Act. It also breached section 17(7)(a) in failing to advise the complainant about its complaints procedure.

38. The HSE explained that the requested information was exempt under section 30(1) in the notice dated 27 April 2009 but did not confirm which paragraph of the exemption it considered to be applicable. The Commissioner expects public authorities to specify in detail which exemption they are relying upon, citing the section, sub-section, paragraph and sub-paragraph where appropriate. HSE's failure to do so in this case constitutes a breach of section 17(1)(b) of the Act.

## **The Decision**

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39. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

It correctly refused the request on the basis that the information held was exempt by virtue of section 30(1)(b).

40. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

It breached sections 17(1), 17(1)(b) and 17(7)(a) in failing to provide a refusal notice within twenty working days of the request which specified the relevant exemption and contained details of the complaints procedure.

It breached section 10(1) in failing to confirm that the requested information was held within twenty working days of the requests.

### **Steps Required**

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41. The Commissioner requires no steps to be taken.

## Right of Appeal

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42. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 sent.

**Dated the 11<sup>th</sup> day of May 2010**

**Signed .....**

**Jo Pedder  
Group Manager**

**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 1(2)** provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

**Section 1(4)** provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time

when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

**Section 1(5)** provides that –

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

**Section 1(6)** provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

### **Time for Compliance**

**Section 10(1)** provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

**Section 10(2)** provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

**Section 10(3)** provides that –

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but

this subsection does not affect the time by which any notice under section 17(1) must be given."

**Section 10(4)** provides that –

"The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

**Section 10(5)** provides that –

"Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner."

**Section 10(6)** provides that –

"In this section –

"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

## **Refusal of Request**

**Section 17(1)** provides that –

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is

exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

**Section 17(2)** states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3)** provides that –

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given

within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

**Section 17(4)** provides that –

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6)** provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

**Section 17(7)** provides that –

"A notice under section (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."

**Section 30(2)** provides that –

"Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to -
  - (i) investigations falling within subsection (1)(a) or
- (b),
  - (ii) criminal proceedings which the authority has power to conduct,
  - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are

conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

- (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources."

**Section 30(3)** provides that –

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."

**Section 30(4)** provides that –

"In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references –

- (a) to any officer of the authority,
- (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
- (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department."

**Section 30(5)** provides that –

"In this section-

"criminal proceedings" includes –

- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
- (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,

- (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
- (d) proceedings before the Courts-Martial Appeal Court, and
- (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957."

**Section 30(6)** provides that –

"In the application of this section to Scotland –

- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
- (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
- (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence."