

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2016

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

Decision (including any steps ordered)

1. The complainant has requested information about out of court settlements. Under section 40(5)(b)(i) of the FOIA, the Health and Safety Executive (HSE) neither confirms nor denies that it holds this information, which it says would be the personal data of third persons.
2. The Commissioner's decision is that HSE is correct to neither confirm nor deny that it holds the requested information, and that the exemption under section 40(5)(b)(i) is engaged. The Commissioner does not require HSE to take any steps.

Request and response

3. On 25 March 2016 the complainant made the following request for information under the FOIA:

*'*How much money has the HSE paid in out of court settlements in the 12 months of 2015 (January 1, 2015, to December 31, 2015), to employees who have brought claims in the Employment Tribunal Court but settled out of court.*

** Please disclose the number of cases settled in this way.*

** Please disclose in each case whether the settlements included a so-called 'gagging clause' agreement.*

** Please disclose the type of claim/s being brought, for example: four unfair dismissal, six discrimination etc.*

** Please disclose the largest amount paid out during the time period.'*

4. On 12 April 2016 HSE responded as follows:

'The Health and Safety Executive can neither confirm nor deny that it holds the information you requested, as the duty in section 1(1) of the Act does not apply by virtue of section 40 of that Act. However, this should not be taken as conclusive evidence that the information you requested exists or does not exist.'

5. On 12 April 2016, the complainant requested an internal review and argued that there was a legitimate public interest in *'showing how taxpayer-funded bodies spend public money.*

The public must have confidence that public bodies are using their limited financial resources in the most appropriate ways and not preventing allegations of wrongdoing from making their way into the public domain...not using public money to protect their reputations...not using public money to silence whistleblowers or those who try to expose wrongdoing or bullying etc within their organisations...

6. The complainant also referred to an information tribunal decision <http://www.informationtribunal.gov.uk/DBFiles/Decision/i1527/Wall,%20Tom%20EA.2014.0265%20%2813.04.15%29.pdf>) which found that the information could be released as it was for special purposes (journalism, as set out in section 3 of the Data Protection Act), and there was substantial public interest in its disclosure.
7. The complainant disclosed that he is a journalist.
8. On 9 May 2016 HSE provided the outcome of the internal review. It had considered the public interest arguments and the Tribunal case supplied by the complainant. HSE upheld its decision.

Scope of the case

9. The complainant contacted the Commissioner on 9 May 2016 to complain about the way the request for information had been handled.
10. The Commissioner has focussed her investigation on whether HSE is correct not to confirm or deny if it holds the information that has been requested, under section 40(5)(b)(i) of the FOIA.

Reasons for decision

11. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the Act to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
12. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
13. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
14. There may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.
15. HSE says that 40(5)(b)(i) applies in this case, namely that confirming or denying whether the requested information is held would contravene the first of the data protection principles.

If held, would the information be personal data?

16. The Commissioner has first considered whether the requested information would be the personal data of third persons if held.
17. The Data Protection Act (DPA) categorises personal data as data that relates to a living individual from which that individual can be identified.
18. HSE has told the Commissioner that, if held, the information would relate to living and readily identifiable individuals, given the relatively small size of the organisation and its main locus at Redgrave Court, Bootle.

19. The Commissioner has considered this and she is satisfied that the requested information would be personal data.

Would confirming or denying the information is held breach any of the data protection principles?

20. HSE has said that the condition under subsection 40(5)(b)(i) applies, namely that confirming or denying it holds the information would contravene the first data protection principle – that personal data should be processed fairly and lawfully.
21. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
22. HSE explained that confirming or denying whether the information is held would communicate whether or not employees have brought claims in the Employment Tribunal Court. It would be a reasonable expectation of all parties concerned that any information would be held in confidence, whether or not confidentiality clauses are inserted into settlement agreements.
23. HSE says that the release of such data, if held, would inform the public, and in particular the colleagues of affected individuals, that there have been investigations or settlements made. The likely consequences of disclosure would result, if held, in the publication of personal information, about a period that was difficult for employees and comprising information that if released would likely affect the wellbeing and working environment of the employees.
24. HSE says that its employees are entitled to expect their personal information would not be disclosed to the public at large by their employer. HSE owes a duty of care to its employees to avoid distress or discomfort in that regard.
25. Releasing information under the FOIA is effectively releasing it to the world at large. In previous, similar decisions – such as FS50565027 – the Commissioner has said that he considers that individuals who are subject to internal investigation are generally entitled to expect that their personal information would not be disclosed into the public domain. Otherwise, public authorities as employers would find it more difficult to encourage staff to engage with disciplinary or grievance procedures.
26. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard. As discussed above, HSE has confirmed that, if any investigations/court claims had taken place, any relevant information would have been treated confidentially.

27. In light of the above the Commissioner accepts the HSE's argument that individuals would have an expectation of confidentiality which would extend to refusing to confirm or deny if any information was held.
28. The Commissioner also accepts that individuals would be likely to feel distressed if HSE confirmed whether or not information of the type requested was held.
29. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information.
30. The complainant has argued that, as a journalist, there is substantial public interest in the disclosure of this information and that following the decision in the information tribunal (<http://www.informationtribunal.gov.uk/DBFiles/Decision/i1527/Wall,%20Tom%20EA.2014.0265%20%2813.04.15%29.pdf>) the information could be released to him as it was for the special purposes of journalism.
31. At paragraph 21 of the tribunal decision, the core issue was whether the provisions of the Data Protection (Processing of Sensitive Personal Data) Order 2000, allowed disclosure of the information in the case. The tribunal found that the information requested was for the purpose of journalism and related to convictions for unlawful acts which may go to the unfitness of persons to act as landlords. The tribunal found that sub-paragraphs (b) and (c) of the Schedule to the Order are complied with and allowed the appeal:

'The Schedule to the Order provides:-

3.-(1) The disclosure of personal data-

(a) is in the substantial public interest;

(b) is in connection with-

(i) the commission by any person of any unlawful act (whether alleged or established),

(ii) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established), or

(iii) mismanagement in the administration of, or failures in services provided by, any body or association (whether alleged or established);

(c) is for the special purposes as defined in section 3 of the Act; and

(d)is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.'

32. HSE also considered whether the release of the information would be necessary for the purposes of the legitimate interests pursued by a third party. In this case HSE considered that

'the requestor's journalistic endeavours to expose the mis-use of public monies on agreements bound by so-called "gagging clauses" was not purpose that outweighed the rights of its employees in the specific circumstances to have their privacy and rights upheld, to not be subject to anxiety and distress in having their confidential information disclosed to the world at large, particularly where, HSE, as a reputable employer, would be extremely concerned for the welfare of its employees and would not deliberately cause them intentional harm or distress or breach its duties as an employer.'

33. HSE has informed the Commissioner that this is not about reputational damage to HSE but rather, if held, damage to its employees in the particular context of this request. HSE also said that in coming to this view the interest of journalism in making such information available to the world at large was not considered to outweigh the rights to privacy of individual employees whose data, if held, would be affected by publication in this particular instance.
34. The Commissioner has considered the relevance of the tribunal decision that the complainant referred to and the response of the HSE and it is clear that although sub-paragraph (c) may have been complied with, sub-paragraph (d) has not been complied with: HSE does not believe that such publication would be in the public interest. The Commissioner is not in a position to comment on sub-paragraph (b).
35. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
36. The Commissioner appreciates that there is a general public interest in accountability and transparency, and the public is entitled to be informed as to how HSE spends its limited financial resources. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of individuals who would be affected by confirming or denying that the requested information is held.

37. The Commissioner's guidance on requests for personal data of public authority employees suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.
38. The Commissioner recognises that information relating to personnel matters such as grievances or discipline will often be inherently "private" in nature. Issues may be relatively innocuous but will still be personal to the individuals involved. In the Commissioner's opinion there is a much weaker public interest in confirming or denying whether this kind of information is held.
39. The Commissioner is satisfied that there is no overriding public interest in this case that outweighs the fact that confirming or denying whether the requested information is held would be likely to cause unwarranted distress and would not fall within employee's reasonable expectations.
40. In conclusion, the Commissioner is satisfied that HSE is correct to apply section 40(5)(b)(i). Confirming or denying whether HSE holds the requested information would not be fair and would therefore contravene one of the data protection principles.

Right of appeal

41. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF