

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 November 2017

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested all the witness statements that the Health and Safety Executive (HSE) obtained as part of its investigation into an incident in October 2015. HSE withheld the information, citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that HSE has correctly applied section 40(2).
3. The Commissioner does not require any steps to be taken as a result of this decision notice.
4. The Commissioner notes that the request and complaint has been submitted by a solicitor's firm on behalf of an organisation. However, for ease of reference this decision notice will refer to them as the complainant.

#### **Request and response**

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5. On 7 April 2017, the complainant wrote to HSE and requested a copy of all the witness statements obtained during the course of an investigation into the injuries suffered by an individual on 22 October 2015 at a property in London.
6. The HSE responded on 8 May 2017 and refused to provide the requested information citing section 40 of the FOIA as its basis for doing so.

7. The complainant requested an internal review on 15 May 2017. Following an internal review the HSE wrote to the complainant on 5 June 2017 and maintained its original position.

## **Background**

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8. An employee working for the complainant was involved in an incident in October 2015. As a result of the incident a report was submitted to the HSE who carried out an investigation. HSE decided not to take any legal action against the complainant. However, the complainant has stated that the employee intends to bring a claim for personal injuries against the complainant. The complainant therefore requires the requested information to assist with its continued investigation into the circumstances of the incident and to prepare its defence to legal proceedings.

## **Scope of the case**

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9. The complainant contacted the Commissioner on the 6 July 2017 to complain about the way his request for information had been handled.
10. The complainant has asked the Commissioner to take into consideration that the information requested falls within section 35(2) of the Data Protection Act 1998 (the DPA). The complainant explained that the employee intends to bring a claim for personal injury and consequential loss against the complainant as a result of the incident, and is of the view that there is a high likelihood that legal proceedings will be issued.
11. Section 35(2) of the DPA provides an exemption from the non-disclosure provisions where the information is *necessary* for the purposes of ongoing or prospective legal proceedings, obtaining legal advice, or otherwise upholding legal rights. The legal proceedings can be civil or criminal; this is not specified in the DPA.
12. This exemption is permissive, which means that it allows an organisation to disclose personal data to a third party in certain circumstances without being in breach of certain parts of the DPA, but it does not compel the organisation to do so. An organisation is not obliged to respond to a request under section 35(2) of the DPA.
13. If an organisation receives a request for third party personal data in connection with legal proceedings, it would need to consider whether disclosure of the information would meet the criteria outlined in section 35(2) of the DPA. If it cannot assure itself of this, it may well decide not

to release the information as a disclosure may then be in breach of the DPA.

14. Even if an organisation can be sure that the exemption applies, it is still not obliged to release the information if it does not wish to do so.
15. Ultimately, section 35(2) is not a right of access. It allows organisations to release information in certain circumstances without breaching the DPA, but it does not compel organisations to do so. The Commissioner is therefore unable to compel organisations to release information under section 35(2) of the DPA.
16. From the information the complainant has provided, HSE has indicated that it will not provide the requested information under section 35(2) of the DPA. As explained above, this is at HSE's discretion.
17. The complainant has also referred to the information requested being disclosed within civil proceedings which would not lead to the witness statements being made available to the public.
18. The disclosure of information under the FOIA is considered to be to anybody that might ask for it, and thus would effectively be making the information publicly available.
19. This means that section 35(2) of the DPA does not invalidate the use of section 40 of FOIA to withhold personal data in response to an FOIA request. A disclosure of personal data to the public at large (which, as explained above, is effectively what a response to an FOIA request is) would not be required for the purposes of legal proceedings. Instead, section 35(2) of the DPA can only be applied to limited disclosures to specific third parties.
20. The complainant has also referred to the disclosure being required pursuant to statute which governs the Civil Procedure Rules. Requests for information under FOIA are in the main applicant and motive blind. The focus is on whether the information is suitable for disclosure into the public domain, rather than the effects of providing the information to the requestor.
21. The Commissioner considers the scope of this case is to determine whether HSE is entitled to rely on section 40(2) of the FOIA as a basis for refusing to provide the withheld information.

## Reasons for decision

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### Section 40(2) – third party personal data

22. This exemption provides that any third party personal data is exempt from disclosure, if that disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA.

### Is the withheld information personal data?

23. In order to rely on the exemption provided by section 40(2), the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

*"personal data" means data which relate to a living individual who can be identified –*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'.*

24. The Commissioner has reviewed the withheld information in this case. The witness statements contain the following information about the witnesses:

- employment history
- training
- qualifications
- wage details
- details of the witness' role
- eye witness accounts of the incident
- details of the injuries sustained in the incident

25. Each of the statements contains information that could identify the witness either by name or by a description of their role and from a description of what happened.

26. In view of this, the Commissioner considers the withheld information to be personal data.

**Does the information contain any sensitive personal data?**

27. Sensitive personal data is defined in section 2 of the DPA. It is personal information which falls into one of the eight categories set out in section 2 of the DPA. Of relevance in this case is that section 2 relates to personal data consisting of information as to:

*"(e) [the data subject's] physical or mental health or condition"*

28. We note the complainant's view that the statements are unlikely to contain sensitive personal data.
29. However, having reviewed the witness statements, the Commissioner is satisfied that some of the withheld information is sensitive personal data. This is because the details of the injuries sustained in the incident relate to an individual's physical or mental health or condition.
30. In light of these findings, the Commissioner will go on to consider whether disclosure of the requested information would breach one of the data protection principles.

**Would disclosure breach the Data Protection Principles?**

31. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle, which is the most relevant in this case, requires that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
32. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure, and whether there is legitimate public interest in the disclosure of the information in question.

**Reasonable expectations**

33. In its submission to the Commissioner, HSE stated that it does not consider that the individuals concerned would have a reasonable expectation that their personal data would be disclosed into the public domain. HSE went on to explain that given the nature of its regulatory remit, individuals would assume that their details would be kept private unless there was a specific reason for this information to be released.

34. HSE has confirmed that it wrote out to the witnesses who provided statements to HSE to ask whether they consented to the disclosure of their statements, and consent was not given.
35. The Commissioner notes the complainant's view that when HSE obtained the statements from the witnesses, it is likely to have informed the individuals concerned, or ought to have informed those individuals, that the information provided and recorded within any witness statement may be relied upon within legal proceedings, particularly as HSE was considering taking legal proceedings against the complainant at the time the statements were taken from the witnesses. However, the Commissioner is of the view that generally speaking there is a reasonable expectation that witness statements will be treated confidentially and not provided to the individual or company that the investigation is about. The Commissioner would also point out that even if HSE had informed individuals that their statement may be relied upon within legal proceedings, and the individuals in question had an expectation that this may happen, this is not the same as those statements being made available to the public at large, as would be the case if they were released in response to a request under the FOIA.
36. Whilst a public authority may seek the view of the individuals concerned about whether their personal data should be disclosed it is not obliged to do so.
37. In this case, the individuals who provided the witness statements have not consented to the disclosure of their personal data. Considering the nature of the withheld information, the Commissioner is of the view that the disclosure of the withheld information would not be within the reasonable expectations of the individuals to whom that information relates.

### **Consequences of disclosure**

38. Disclosure of the information is unlikely to be fair if it would have unjustified adverse effects on the individuals concerned. Although individuals may generally regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
39. HSE has asked the Commissioner to consider the fact that if it were to disclose personal data, such as the names of the witnesses, then it could have an impact on any future investigations as individuals may be less willing to provide their details voluntarily. HSE acknowledges that this is not a factor when considering the section 40(2) exemption; however it

would like the Commissioner to take this into consideration for non-disclosure of personal data.

40. Whilst the Commissioner appreciates that the disclosure of information could have an impact on any future investigations because individuals may be less willing to provide their details voluntarily, this would not constitute an unjustified adverse effect on the witnesses themselves. However, the Commissioner is of the view that the information within the witness statements is more than just a name and includes some sensitive personal data about the injuries sustained in the incident. It is therefore likely that the disclosure of the information would cause unnecessary distress to the witnesses. Furthermore, the incident was likely to have been traumatic for the witnesses to have seen so the disclosure of information, which directly links them to their experience of the incident, in the public domain would be unnecessarily distressing.

### **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure**

41. The Commissioner accepts the legitimate public interest in disclosure includes the general public interest in transparency, public interest in the issue the information relates to and any public interest in disclosing the specific information. An informed and involved public helps to promote good decision making by public bodies and ensures trust and confidence in the governance and processes within those bodies.
42. However, given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
43. The complainant has not specified in its submissions to the Commissioner any legitimate public interest in disclosing the requested information. However, she notes the complainant's specific interest in disclosure in that the requested information is required to assist with the complainant's continued investigation into the circumstances of the incident and to help it prepare its defence to any legal proceedings.
44. HSE has explained that it appreciates that the complainant would like sight of the witness statements but it does not consider that the FOIA is the appropriate legislation under which to obtain the requested information. This is because HSE is of the view that the requested information will not be serving the public interest, but the private interests of the complainant. HSE has stated that the complainant could apply to a Court under civil litigation rules and the Court could order

HSE to disclose the information if it determines that the necessity test is satisfied.

45. In this case, whilst the Commissioner accepts that the specific information requested may be of interest to the complainant, she is not convinced that its disclosure is of sufficient wider public interest to warrant overriding the rights and expectations of privacy of the individuals to whom that information relates.
46. HSE has also referred to a previous decision notice issued by the Commissioner under reference number FS50576818, in which it states that the Commissioner considered witness statements to be the personal data of the witness and not to release without consent.
47. The Commissioner has reviewed the previous decision notice that HSE has referred to in its submission to the Commissioner. In the previous decision notice, the complainant had requested the names of witnesses and their statements in relation to a HSE investigation into an incident. In this case, the Commissioner concluded that the witness statements were personal data and that disclosure would be unfair and breach the Data Protection Principles. The Commissioner considers that similar arguments apply in this case.

## **Conclusion**

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48. In view of the above, the Commissioner has concluded that to disclose the withheld information would be unfair and in breach of the first principle of the DPA. The Commissioner therefore finds that HSE has correctly applied section 40(2) of the FOIA to the withheld information by virtue of section 40(3)(a)(i).



## Right of appeal

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49. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
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**Wilmslow**  
**Cheshire**  
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