

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 21 November 2018

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

Decision (including any steps ordered)

1. The complainant has requested from the Health and Safety Executive ('the HSE') a copy of a witness statement held in an Inspector's notebook. The HSE says it does not hold this information.
2. The Commissioner's decision is as follows:
 - The HSE was entitled to refuse to disclose the requested information as it did not hold the information when it received the complainant's request. As such, the HSE complied with regulation 12(4)(a) of the EIR.
3. The Commissioner does not require the HSE to take any steps to ensure compliance with the legislation.

Request and response

4. On 30 August 2017 the complainant wrote to the HSE and requested information in the following terms:

"Under ordinary circumstances I should have received a copy of my witness statement which was formal and taken by [HSE Inspector] in

front of my daughter who was present. I am now informed that this was not rendered as a formal statement, but was retained as a record which was accessed. I therefore request a copy of this be it in typed form or hand written."

5. The HSE responded on 26 September 2017. It said it no longer holds the Inspector's notebook or witness statement concerned.
6. On 8 October 2017 the HSE provided an internal review. It confirmed it does not hold the information the complainant has requested.

Scope of the case

7. The complainant contacted the Commissioner on 20 March 2018 to complain about the way his request for information had been handled.
8. Having considered the HSE's submission and the circumstances of the situation the Commissioner's initial assessment of the complaint was that the HSE does not hold the information the complainant has requested. She communicated this to the complainant and invited him to withdraw his complaint. The complainant did not accept the Commissioner's assessment and preferred to progress to a formal decision notice.
9. In subsequent correspondence to the Commissioner the complainant accepted that the notebook had been destroyed. He also again detailed his wider concerns about the HSE's investigation and its destruction of the notebook.
10. Since it was no longer in dispute that the notebook is not held, the Commissioner again advised the complainant to withdraw his complaint. She explained that it is not within her role to consider his wider complaint about the HSE's investigation and that he should pursue this with the HSE. The Commissioner also explained that with no strong evidence to suggest that HSE had deliberately destroyed the notebook after it had received his request, she would not consider whether an offence under regulation 19 of the EIR had occurred. (Regulation 19 of the EIR says that where a request for environmental information has been made to a public authority and the applicant would have been entitled to that information, it is an offence to alter, deface, erase, destroy or conceal any record the authority holds with the intention of preventing the disclosure of that information.)
11. The complainant again resisted withdrawing his complaint and the matter will therefore be concluded through this decision notice.

12. The Commissioner's investigation has focussed on whether the HSE has complied with regulation 12(4)(a) of the EIR. That is, whether, on the balance of probabilities, the HSE held the information the complainant requested on 30 August 2017 at the time it received this request.

Reasons for decision

Is the request for environmental information?

13. The requested information in this case is an Inspector's notebook associated with an investigation into the removal of asbestos from a private house.
14. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR if it meets the definition set out in regulation 2(1)(a) to 2(1)(f).
15. Regulation 2(1)(b) says that information is environmental information if it concerns factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in 2(1)(a). The elements in 2(1)(a) include air and atmosphere.
16. Regulation 2(1)(c) says that information is environmental information if it concerns measures (such as policies, legislation, plans and programmes) or activities affecting or likely to affect the elements and factors referred to in regulations 2(1)(a) and 2(1)(b).
17. In its submission, the HSE has told the Commissioner that it considered the request to fall within scope of the Environmental Information Regulations rather than the Freedom of Information Act because the complainant's witness statement related to the methods the company concerned used when it removed asbestos from his property. The company did not engage sufficient safeguards when removing asbestos from the property and this led to asbestos fibres entering the atmosphere exposing those living and working at the property to these fibres.
18. HSE is of the view that the release of asbestos was a factor affecting the environment (air) within the complainant's property and that the statement he provided was a formal record of the measures (working practices) undertaken by the company designed to protect those elements.

19. The Commissioner agrees and is satisfied that the HSE was correct to handle the request under the EIR.

Regulation 12(4)(a) – information not held

20. Regulation 12(4)(a) of the EIR says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
21. In its submission to the Commissioner, the HSE has provided a background to the request. It says that in 2011 the complainant engaged a company to remove asbestos lagged pipework from his property. This work was undertaken during November 2011.
22. In December 2011, after the company had concluded work on the property, the complainant's wife contacted the HSE raising a concern about the standard of work undertaken by this company. Following this complaint, the HSE undertook a full investigation of the concern raised and this subsequently resulted in the HSE successfully prosecuting the company for breaching health and safety legislation.
23. With regard to it not holding the requested information, HSE has explained that the information the complainant is seeking was held within the Inspector notebook belonging to the HSE Inspector who investigated the complaint about the company concerned. Following receipt of the complainant's request HSE has confirmed that it undertook a full search of its corporate paper records to establish if it held the notebook holding this statement and established that the HSE no longer held this notebook. HSE says it did not undertake an electronic search for the notebook because Inspectors' notebooks are always held as a paper record.
24. HSE has confirmed that it did hold the witness statement in question within a notebook used by the particular Inspector named in the request and that this notebook was destroyed in line with its retention policy. HSE says it is unable to provide a specific date when the Inspector's notebook was destroyed, however it is likely to have been in 2012. This is because Inspectors' notebooks which do not contain information relating to ongoing investigations are retained for either one year after they were created or until they are full, whichever comes first. HSE says that while it was still investigating the incident involving the company in 2012, the information held within the notebook containing the statement was not deemed relevant to the investigation and it could therefore be destroyed.
25. In its submission to the Commissioner, HSE has said it has no wish to withhold information from the complainant and if it held the statement

he provided to the Inspector concerned it would disclose it to him. HSE has gone on to say that both the complainant and his wife provided statements to it during the course of its investigation. However, as both statements were practically identical HSE decided only the statement provided by the complainant's wife would be used as evidence supporting enforcement action. HSE says it understands this decision was communicated to the complainant and his wife by the named Inspector. On this basis, the statement provided by the complainant's wife was the only statement transcribed into a formal document for use in Court. The statement the complainant provided was therefore never transcribed into a formal document and remained within the body of the Inspector's notebook until the notebook was destroyed. HSE then re-stated in its submission that the notebook was destroyed because the contents of the notebook were not deemed relevant to any HSE investigation detailed within it.

26. HSE has referred the Commissioner to its Business Classification Scheme which can be viewed via the following link - <http://www.hse.gov.uk/foi/busclasschem.pdf>. HSE says that the retention periods associated with material gathered during an investigation is detailed on page 19. It says it can be seen that, under the 'Exemption' heading on page 7, HSE's published policy relating to Inspector notebooks is that they are disposed of one year after creation or when full, if the information within them is not deemed relevant to an ongoing investigation. HSE has noted that all its records and its retention policy is accredited by The National Archives and approved by its Board.
27. In correspondence to the Commissioner the complainant has expressed concern that HSE has destroyed information that he considers it should have retained. The Commissioner explained to him that her role is to consider whether or not requested information is held and whether a public authority has complied with the EIR (or FOIA). It is not within her role to consider whether a public authority *should* hold particular information. Aside from offences covered by regulation 19, neither is it within the Commissioner's role to consider whether or not information should have been destroyed. Nor can the Commissioner comment on the complainant's wider concerns about the HSE and its investigation into the company concerned.
28. On the balance of probabilities, the Commissioner is satisfied that the HSE does not hold the information the complainant has requested, ie a particular notebook. The HSE did not consider the notebook was relevant to the associated investigation and destroyed it in line with its retention schedule. The Commissioner appreciates that the complainant considers the notebook to be important and considers that the HSE should not have destroyed it, but the Commissioner is satisfied that it

was destroyed. She therefore finds that HSE could refuse to disclose the requested information under regulation 12(4)(a) as it did not hold this information at the point it received the complainant's request.

Right of appeal

29. 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

30. 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.
31. 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
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF