

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2021

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

Decision (including any steps ordered)

1. The complainant has requested the training, experience and technical education of an inspector of the Health and Safety Executive (the HSE). The HSE provided a generic list of training for inspectors but it stated that it did not hold training information about the named HSE inspector. The HSE has also refused to provide the experience and qualifications of the named HSE inspector under section 40(2) of the FOIA (third party personal data).
2. The Commissioner's decision is that, on the balance of probabilities, the HSE does not hold any training information in relation to the named HSE inspector. The Commissioner has also decided that the HSE is entitled to rely on section 40(2) of the FOIA to withhold the experience and qualifications of the named HSE inspector.
3. However, the Commissioner has recorded a procedural breach of section 1 and section 10 of the FOIA as the HSE failed to advise the complainant that it did not hold the training information of the named HSE inspector within the statutory time limits.
4. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Background

5. The Commissioner understands that in February 2019, the HSE was notified of a concern relating to unsafe working practices at a

construction site owned by a limited company, of which the complainant is one of the directors. An HSE inspector visited the site and concluded that the incident observed had the potential to cause personal injury to one or more individuals through failings in management systems. The company was immediately served with two prohibition notices preventing it from operating the practices observed and the HSE commenced a full investigation. The Commissioner understands that this investigation has been placed on hold because the complainant has appealed these notices.

Request and response

6. On 23 August 2019, the complainant wrote to the HSE and made the following request for information:

"...the disclosure by HSE of [HSE inspector's name redacted] training, experience and technical education in relation to the matters on which she exercised her opinion in our case to support the prohibition notices she issued."

7. The HSE responded on 6 September 2019. It provided a generic list of training for inspectors but refused to provide the specific details of the named HSE inspector, citing section 40(2) of the FOIA as its basis for doing so.
8. The complainant requested an internal review of the HSE's decision on 12 September 2019.
9. Following an internal review, the HSE wrote to the complainant on 9 October 2019 maintaining its original position.

Scope of the case

10. The complainant contacted the Commissioner on 14 October 2019 to complain about the way his request for information had been handled.
11. During the course of the investigation, the complainant advised the Commissioner that he had received a list of documents produced by the HSE in relation to an Employment Tribunal Court Order. The complainant explained that if the requested documents were provided in relation to the Court Order then his complaint would cease to be necessary. However, the complainant later confirmed that the list did not include the information requested in this case and that he wished to proceed with the complaint.

12. Also, during the course of the Commissioner's investigation, the HSE reviewed its response to this request and revised its position. It stated that it does not hold training information for the named HSE inspector. It confirmed that it holds information relating to the named HSE inspector's experience and qualifications. The HSE is withholding this information under section 40(2) of the FOIA on the basis that it is third party personal data, disclosure of which would breach data protection law.
13. The Commissioner considers the scope of this case is to determine whether the HSE holds any training information in relation to the named HSE inspector. She will also consider whether the HSE is entitled to withhold the information relating to the named HSE inspector's experience and qualifications under section 40(2) of the FOIA.

Reasons for decision

Section 1 – general right of access

14. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and (b) if the information is held, to have that information communicated to them.
15. In this case, the HSE stated that it does not hold information relating to the training of the named HSE inspector.
16. Where there is some dispute between the amount of information the public authority states it holds and the amount of information that a complainant believes might be held, the Commissioner, in accordance with a number of First-Tier Tribunal decisions, applies the civil standard of the "balance of probabilities".
17. It is important to explain that the FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
18. In this case, the HSE stated that it does not hold information relating to the training of the named HSE inspector.
19. In its submission to the Commissioner, the HSE stated that it holds details of qualifications relevant to employees at the time of their employment in their personnel file.

20. The HSE explained that any training or qualifications employees gain post-employment are not recorded within their personnel files. Instead, they are recorded on a system called "Single Operating Platform" (SOP). The HSE went on to explain that data entry into SOP is entirely voluntary and is something that employees undertake themselves. The HSE stated that it has checked the SOP entry for the named HSE inspector and confirmed that it does not contain any of the information requested by the complainant.
21. The Commissioner noted that the HSE provided the complainant with a generic list of training for inspectors with its initial response to the complainant dated 6 September 2019. The Commissioner therefore asked the HSE whether the listed training is mandatory (i.e. all inspectors must undergo the training) or is entirely optional training (i.e. inspectors are not required to undergo any additional training once they have been employed).
22. The HSE stated that the list of training provided to the complainant is the HSE's current mandatory training program for all new inspectors joining the organisation.
23. The HSE explained that when a new inspector begins the mandatory training, they are mentored by their immediate line manager and other experienced inspectors throughout the training programme. The HSE went on to explain that the majority of the training is face to face interaction that occurs every eight weeks as part of its normal performance measures. The HSE confirmed that any details of these discussions would be recorded by the inspector and their line manager, but it would only be the inspector that would record the information on SOP.
24. The HSE confirmed that it does not hold any records relating to the mandatory training completed by the named HSE inspector.
25. The Commissioner noted that the generic list of training for inspectors provided to the complainant with its initial response dated 6 September 2019 stated that the "Inspectors – regulatory & disciplinary specialists" training will often have to be made by line managers. She also noted that it refers to updates and refresher training. The Commissioner therefore asked the HSE to confirm how it would know whether a line manager had authorised the training and whether a particular inspector required update or refresher training. The Commissioner asked the HSE to confirm whether any such record is held in relation to the named HSE inspector.
26. The HSE stated that its line managers work directly with its Learning and Development Team to arrange any training required for their staff

that cannot be met through Civil Service Learning. The HSE confirmed that it does not hold any records relating to the named HSE inspector.

27. The Commissioner has considered the HSE's representations in this matter. She finds that the searches undertaken by the HSE were reasonable in the circumstances; training and qualifications are most likely to be held within the employees personnel file or SOP so searching these files should provide results if information is held. The Commissioner considers the search used were relevant enough to identify any relevant information.
28. The Commissioner considers the HSE's representations to be credible. She therefore finds that, on the balance of probability, the HSE does not hold any training information in relation to the named HSE inspector.

Section 40 personal information

29. The HSE has confirmed that it does hold information relating to the named HSE inspector's experience and qualifications. The HSE is withholding this information under section 40(2) of the FOIA.
30. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
31. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
33. Secondly, if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

¹ As amended by Schedule 19 Paragraph 58(3) DPA 2018.

Is the information personal data?

34. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

36. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

37. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

38. The Commissioner notes that the request names a specific individual and requests information about them. She considers that it is clear in this case that the information in question is the personal data of the named HSE inspector (the data subject). It identifies them, as the information is provided in response to a question about the data subject. Furthermore, it is biographically significant and has the data subject as its focus.

39. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the named HSE inspector. She is satisfied that this information both relates to and identifies the named HSE inspector concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

Would disclosure of the information contravene any of the DP principles?

40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

41. The most relevant DP principle in this case is the one contained within Article (5)(1)(a) of the GDPR, which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

42. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
43. "Lawful" processing is defined by Article 6(1) of the GDPR, which specifies that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in Article 6 applies. In other words, for processing to be lawful, it must satisfy one of the lawful bases for processing listed in Article 6(1).
44. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f), which states that processing will be lawful if:
- "(the) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*².
45. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information.
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question.
 - iii) **Balancing test:** Whether the above interests override the legitimate interests or fundamental rights and freedoms of the data subject.

² Article 6(1) goes on to state that: -

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that: -

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

46. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test

47. In considering any legitimate interests in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interests can include broad general principles of accountability and transparency for its own sake, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Both compelling or trivial interests can be legitimate interests, but trivial interests may be more easily overridden in the balancing test.
48. In his submissions to the Commissioner, the complainant has not provided any reasons as to why he has requested the information in question or what his interests in it are. However, the Commissioner notes that the complainant stated to the HSE in his initial request for information that:

"In our case I have consistently alleged incompetence on the part of your inspector and questioned her good faith. As your complaint process apparently just does not accept and address complaints on such grounds it affords no route to scrutiny of the competence or integrity of [HSE inspector's name redacted]. I therefore need to extend my FOIA request of 12 August to include the disclosure by HSE of [HSE inspector's name redacted] training, experience and technical education in relation to the matters on which she exercised her opinion in our case to support the prohibition notices she issued."

49. The Commissioner also notes that the complainant argued in his internal review request that:

"The information requested is solely in relation to [HSE inspector's name redacted] line of work, where she is involved with members of the public. Her specific training is what must support the exercise of the legal powers conferred upon her. Obviously if she does not have the necessary training or expertise in certain circumstances she would be acting outside of her legal powers if she presumes to take a dictatorial role in

them. Clearly openness as to her credentials is an essential foundation of her use of her powers of intervention."

50. From the above statements, it is clear that the complainant disagrees with the decisions made by the HSE in his case and, in particular, by the named HSE inspector. His interest in making the request for information would therefore appear to be to challenge those decisions.
51. The Commissioner considers that there is a legitimate interest in individuals being able to challenge decisions made by a public authority that affect them. The Commissioner also notes that there is a wider general legitimate interest in public authorities being open and transparent.
52. The Commissioner is therefore satisfied that the complainant was pursuing a legitimate interest in making his request for information.

Necessity test

53. Where a legitimate interest is being pursued in a request for information that includes third party personal data, it must then be considered whether the disclosure of that information is 'necessary' for the purposes of that legitimate interest.
54. 'Necessary' means more than desirable but less than indispensable or an absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
55. The Commissioner has considered whether disclosure of the requested information is necessary to meet the requester's specific legitimate interests and the wider legitimate interest in openness and transparency by public authorities.
56. It is important to make clear at this point that disclosure under the FOIA is disclosure into the public domain, not just specifically to the requester. The Commissioner has therefore considered whether disclosure of the named HSE inspector's personal data to the world at large is necessary to meet the legitimate interests identified above.
57. The Commissioner acknowledges that the complainant is dissatisfied with the conduct of the named HSE inspector. However, she also notes that the named individual is a representative of the HSE, and it is ultimately the HSE that is responsible for the conduct of its employees.

58. The Commissioner considers that the appropriate approach when dissatisfied with an HSE employee's conduct is to follow the HSE's complaint procedure or complain to the relevant regulatory body or ombudsmen. The Commissioner does not consider that public knowledge of the named HSE inspector's qualifications would aid in rectifying the complainant's dissatisfaction.
59. The Commissioner also notes that the complainant appealed the two prohibition notices to the Employment Tribunal and asked for his case to be paused whilst he waited to see if the requested information would be produced as part of a list of documents the HSE would provide as part of the appeal. If information is required for legal action, there are more appropriate routes available to litigants to obtain any required information via the court.
60. In view of this, and in view of the information that the HSE has already released to the complainant, the Commissioner does not consider the release of the named HSE inspector's personal data to be necessary to satisfy the legitimate interests pursued by the complainant.
61. As disclosure is not necessary, there is no lawful basis for this processing, and it would therefore be unlawful. It therefore would not meet the requirements of Article 5(1)(a) of the GDPR. The Commissioner has therefore not gone on to conduct the balancing test.

The Commissioner's view

62. In view of the above, the Commissioner is satisfied that the HSE does not hold any information in relation to the named HSE inspector's training.
63. With regards to the information that the HSE does hold in relation to the named HSE inspector's qualifications and experience, the Commissioner considers that the HSE was entitled to withhold the information under section 40(2), by way of section 40(3A)(a), as disclosure of the information would breach the DP principles. Specifically, it would not be compliant with Article 5(1)(a) of the GDPR.

Procedural matters

Section 10 – time for compliance

64. Section 10(1) states that a public authority shall respond to information requests promptly and in any event no later than 20 working days from receipt.

65. By failing to advise the complainant that it did not hold some of the requested information within the required timescales, the HSE has breached sections 1(1) and 10(1) of the FOIA.

Right of appeal

66. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

67. 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.
68. 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

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