

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 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 information relating to an incident report held by the Health and Safety Executive (HSE). The HSE relied on sections 30(1) (investigations and proceedings conducted by public authorities) and 40(2) (third party personal data) of the FOIA to withhold the requested information.
2. The Commissioner's decision is that the HSE is entitled to rely on section 40(2) of the FOIA to withhold the third party personal data contained within the withheld information. The Commissioner has also decided that the remaining withheld information is exempt from disclosure under section 30(1) of the FOIA, and that the public interest favours maintaining the exemption.
3. However, the Commissioner has recorded a procedural breach of section 17 of the FOIA, as the HSE failed to issue the complainant with a refusal notice within the statutory time limits.
4. The Commissioner does not require any steps to be taken as a result of the decision notice.

Background

5. The Commissioner understands that in December 2016, an employee of a highways, engineering and construction specialist company (the employer), which is part of a group of companies that is wholly-owned by a Council, sustained a head injury whilst at work. The incident

was reported to the HSE by the employer under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR). The Commissioner understands that the HSE investigated the incident and, in this case, was unable to determine how the employee was injured, nor could it find any evidence to suggest that the employer was responsible for any health and safety failings.

Request and response

6. On 20 April 2020, the complainant wrote to the HSE and made the following request for information:

"I would like to make an additional FOI request please. The HSE investigated a complaint that had been made by me of the actions, or lack of actions, of [employer's name redacted]. The investigation was carried out by [name 1 redacted] between November 2019 and April 2020. It is referred to in a letter from [name 2 redacted] of HSE to me dated 17 April 2020, see copy attached.

Would you please provide copies of:

1) the letter sent recently by [name 1 redacted] to [employer's name redacted] referred to at A in the [name 2 redacted] letter;

2) written records of the further information, lessons learnt or improvements made by [employer's name redacted] referred to at B in the same letter."

7. The HSE responded on 27 May 2020. It provided the letter requested in part one of the request but refused to provide the information requested in part 2, stating that *"this is in line with HSE's policies and procedures on information sharing."*
8. On 27 May 2020, the complainant requested an internal review of the HSE's decision to refuse to provide the information requested in part two of the request.
9. Following an internal review, the HSE wrote to the complainant on 26 October 2020 refusing to provide the requested information. It cited sections 30(1) (investigations and proceedings conducted by public authorities) and 40(2) (third party personal data) of the FOIA as its basis for doing so.

Scope of the case

10. The complainant initially contacted the Commissioner on 3 September 2020 to complain about the way his request for information had been handled and the fact that he had still not received a decision regarding the internal review he had requested.
11. The Commissioner wrote to the HSE on 11 September 2020 and requested that it issue an internal review decision as soon as practicable and within 10 working days.
12. The complainant wrote to the Commissioner on 3 October 2020, confirming that he had still not received a response to his internal review request. The Commissioner therefore accepted the complaint for investigation.
13. During the course of the Commissioner's investigation, the HSE advised her on 8 June 2021 that it had issued the complainant with its internal review decision on 26 October 2020. The Commissioner responded to the HSE on 7 July 2021, explaining that the complainant had advised her in February 2021 that he had not heard anything from the HSE since the Commissioner accepted his case for investigation on 5 October 2020. It therefore appeared that the complainant had not received the internal review decision. The Commissioner requested that the HSE resend its internal review decision. The HSE confirmed that it resent a copy of its internal review decision to the complainant on 27 October 2021.
14. The Commissioner therefore considers the scope of this case is to determine whether the HSE is entitled to rely on section 40(2) to withhold any third party personal data and section 30(1)(b) of the FOIA to withhold the remaining information.

Reasons for decision

Section 40 personal information

15. 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.

16. 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 UK General Data Protection Regulation (UK GDPR).
17. 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 2018'). If it is not personal data, then section 40 of the FOIA cannot apply.
18. 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.

Is the information personal data?

19. Section 3(2) of the DPA 2018 defines personal data as:

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. An individual is "identifiable" if they 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.
22. 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.
23. In this case, the HSE has explained that the withheld personal data consists of data relating to:
 - employees at the employer and its parent company;
 - HSE personnel; and
 - other third parties.

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

24. The HSE explained that the information in question is varied in nature and ranges from names and contact details to personal opinions and accounts relating to the incident being investigated. The information also contains sensitive information relating to the injured employee, such as the nature of their injuries and ongoing health (i.e. "special category personal data", see paragraph 31 of this decision notice).
25. In the circumstances of this case, having considered the information being withheld under section 40(2) of the FOIA, the Commissioner is satisfied that the information relates to living individuals. She is satisfied that this information both relates to and identifies the individuals 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?

26. The fact that information constitutes the personal data of identifiable living individuals 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.
27. The most relevant DP principle in this case is the one contained within Article 5(1)(a) of the UK GDPR, which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
28. 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 doing so would be lawful, fair and transparent.
29. In order to be lawful, one of the lawful bases for processing listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful (i.e. not in contravention of any other laws).
30. In addition, if the requested data is "special category" personal data, the public authority must be able to satisfy one of the conditions listed in Article 9 of the UK GDPR in order for disclosure to be lawful and compliant with principle (a).

Is the information special category data?

31. Information relating to "special categories" of personal data is given special status in the UK GDPR.
32. Under Article 9 of the UK GDPR, "special category" personal data is data which:

- a) reveals racial or ethnic origin,
 - b) reveals political opinions,
 - c) reveals religious or philosophical beliefs,
 - d) reveals trade union membership,
 - e) genetic data,
 - f) biometric data for the purpose of uniquely identifying a natural person,
 - g) data concerning health, or
 - h) data concerning a natural person's sex life or sexual orientation.
33. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that some of the withheld information does include special category personal data. She has reached this conclusion on the basis that some of the withheld information concerns the health of the employee.
34. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it cannot be processed (including disclosure under the FOIA) unless one of the stringent conditions listed in Article 9 can be met.
35. The Commissioner considers that the only conditions in Article 9 that could allow the disclosure of special category personal data under the FOIA are:
- a) the data subject has given explicit consent to the disclosure; or
 - e) the personal data in question has been manifestly made public by the data subject.
36. The Commissioner has seen no evidence or indication that the individual concerned has explicitly consented to this data being disclosed to the world at large in response to the FOIA request, nor has she seen evidence to suggest that they had deliberately made this data public at the time of the request.
37. As none of the conditions required for processing special category data are satisfied, disclosing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Lawful processing: Article 6(1)(f) of the UK GDPR

38. Having dealt with those elements of the withheld information which constitute special category data, there remains some information which does not fall within the special categories but is nevertheless personal data.
39. "Lawful" processing is defined by Article 6(1) of the UK GDPR, which states 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).
40. The Commissioner considers that the lawful basis most applicable to disclosure under the FOIA is that provided by Article 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.
41. In considering the application of Article 6(1)(f) of the UK 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.

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".

- 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.

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

Legitimate interests

43. 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 considered "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 and trivial interests can be legitimate interests, but trivial interests may be more easily overridden in the balancing test.
44. In the complainant's initial submission to the Commissioner, he advised that the HSE could provide the requested information with the individuals' names redacted.
45. The Commissioner also notes in the complainant's internal review request that he is of the view that there is a public interest in being able to judge whether or not the HSE's decision not to issue an Improvement Notice was based upon sound grounds.
46. It is clear that the complainant disagrees with the decisions made by the HSE in this case and, in particular, the decision not to take further action against the employer and its parent company. His interest in making the request for information would therefore appear to be to understand those decisions.
47. The Commissioner considers that there is a legitimate interest in individuals being able to understand and challenge decisions made by a public authority that affect members of the public. The Commissioner also notes that there is a wider general legitimate interest in public authorities being open and transparent.

48. The Commissioner is therefore satisfied that the complainant was pursuing a legitimate interest in making his request for information.

Necessity test

49. 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.
50. "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.
51. 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.
52. 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 third-party individuals' personal data to the world at large is necessary to meet the legitimate interests identified above.
53. The Commissioner considers that the disclosure of the withheld personal data is likely to give the public more insight into why the HSE came to the decision not to take action, and there is no other way that the same objective could be achieved by other less intrusive means. She therefore considers that disclosure would be necessary to meet the legitimate interest identified.

Balance between legitimate interests in disclosure and the data subjects' interests or fundamental rights and freedoms

54. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
55. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the data subject expressed concern about the disclosure; and
 - the reasonable expectations of the data subject.
56. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
57. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
58. The HSE has stated that all individuals concerned have a reasonable expectation that their personal data will be kept confidential by the HSE and will not be disseminated into the public domain. The HSE is of the view that disclosing their personal data in response to an FOI request would breach the first principle of the DPA in that it would be unfair and unlawful.
59. The HSE has confirmed that it has not consulted the individuals concerned for their views on disclosure. The HSE is of the view disclosure of the personal data into the public domain would cause unnecessary or unjustified damage or distress to the individuals concerned. It stated that this is because the complainant has the potential to contact the individuals concerned to either try and resurrect this case that it considers to have been fully investigated or to question individuals about their comments.
60. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
61. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

62. The Commissioner has therefore decided that the HSE was entitled to withhold the requested information that constitutes personal data under section 40(2), by way of section 40(3A)(a).
63. The Commissioner will now go on to consider whether the HSE was entitled to withhold the remaining requested information under section 30(1)(b) of the FOIA.

Section 30(1)(b) - power to investigate offences and conduct proceedings

64. Section 30(1)(b) provides that information is exempt if it has been held at any time for the purposes of 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 the power to conduct.
65. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1)(b) if it relates to a specific ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing if it is subsequently used for this purpose.
66. Consideration of section 30(1)(b) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Is the exemption engaged?

67. The first step is to address whether the requested information falls within the class specified in section 30(1)(b).
68. The Commissioner has issued guidance on section 30(1)(b) which clarifies that the exemption "... *applies to investigations but the public authority only needs to have the power to conduct those investigations rather than a duty. Importantly, the public authority must also have the power to institute and conduct any criminal proceedings that result from its investigation.*"
69. The HSE has stated that it is the statutory body responsible for the regulation and enforcement of workplace health, safety, and welfare within the UK and that its statutory powers and responsibilities are derived from the "Health and Safety at Work etc. Act 1974" (HSWA) and

associated relevant statutory provisions. The Commissioner understands that sections 20 to 23 of the HSWA and associated legislation provide HSE inspectors with powers of entry to workplaces, powers to investigate incidents and powers to take enforcement action, including prosecution, against those responsible for offences under the HSWA and associated legislation. The Commissioner notes that the HSE inspectors' power to bring prosecutions is given under section 39 of the HSWA.

70. Section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence, or the power to conduct such investigations and/or institute criminal proceedings. The HSE clearly has a duty to investigate whether someone should be charged with an offence under the 1974 Act, it has the power to conduct such investigations and the power to institute criminal proceedings. The Commissioner therefore considers that the information requested does fall within the class of information to which section 30(1)(b) FOIA applies.

Public Interest Test

71. Section 30(1)(b) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
72. In accordance with her guidance, when considering the public interest in maintaining exemptions the Commissioner considers that it is necessary to be clear what the specific exemptions are designed to protect.
73. The purpose of section 30 is to preserve the ability of public authorities to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged is whether the disclosure of the requested information could have a harmful impact on the ability of the authority to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of authorities to investigate crime effectively.

Public interest arguments in favour of disclosing the information

74. The Commissioner notes from the complainant's internal review request that he is of the view that there is a public interest in being able to judge whether or not the HSE's decision not to issue an Improvement Notice was based upon sound grounds.
75. In the complainant's response to the internal review decision, he explained that the main reason for pursuing this case has been to protect the public interest. He stated that the employer is carrying out

potentially hazardous tasks every day of the week on the public highways and the public need to be assured that the management of the employer and its parent company are carrying out their health and safety duties competently and are accountable for what they do.

76. The complainant argued that the public need to understand why the HSE thinks that no further action needs to be taken against an employer that has failed to provide accurate information to the HSE. The complainant is also of the view that by failing to disclose the withheld information, the HSE is leaving itself open to criticism that it has taken an unduly lenient view on the misdeeds of the employer and its parent company. He argued that the public needs reassurance that the HSE reached its conclusion not to prosecute the employer and its parent company for valid, objective reasons and that it was not influenced by the fact that the Health, Safety, Environment and Quality Director of one of the companies is an ex-HSE inspector.
77. The HSE recognised in its internal review decision that the disclosure of the withheld information would promote transparency and build public confidence in its investigation.
78. The HSE also stated that it would secure the health and safety of others.

Public interest arguments in favour of maintaining the exemption

79. The HSE has argued that the disclosure of the withheld information would be likely to impede the gathering of information and evidence in future investigations. It stated that although the HSE has powers under the HSWA to obtain information from those under investigation, it prefers to obtain information voluntarily, as this generally provides the HSE with a greater range of information that makes its ability to investigate incidents easier. The HSE argued that when it has to compel those under investigation to provide information, it can often not rely on that information in a court of law. It stated that the incident report prepared by the employer was provided to the HSE voluntarily.
80. The HSE has also argued that the disclosure would be likely to inhibit its ability to conduct further investigations effectively because third parties may be less willing to volunteer information to the HSE if it is disclosed into the public domain inappropriately.
81. The HSE also argued that the disclosure of the withheld information could be detrimental to those under investigation. It stated that in this case, the HSE could not establish how the injured party was injured and it could find no failings by the injured party's employer. The HSE explained that because it cannot restrict how information will be used following disclosure under FOI, it is possible the withheld information

could be used by the complainant to the detriment of the employer, and this would be unfair.

82. The HSE stated that the disclosure would be unfair in cases where a decision is taken not to proceed to enforcement action or prosecution.
83. In relation to the above point, the Commissioner would again clarify that although the complainant has requested this information, any disclosure under the FOIA is made not only to the requester, but to the public in general.

Balance of the public interest arguments

84. Having given due consideration to the arguments put forward by both parties, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.
85. In reaching this conclusion on the balance of the public interest, the Commissioner has considered the public interest in the HSE disclosing the withheld information.
86. The Commissioner considers that there is a strong public interest in openness and transparency, particularly in relation to information relevant to the health and safety on construction sites.
87. The Commissioner also recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the investigations they carry out.
88. However, whilst the Commissioner recognises that the investigation in this case is now closed, disclosure of the withheld information may have a detrimental impact on future investigations.
89. As set out above, the purpose of section 30 is to protect the effective investigation and prosecution of offences. It is in the public interest to protect the ability of the HSE to investigate potential offences, to gather evidence, and to successfully prosecute offences.
90. The Commissioner also considers the principle of confidentiality to be important. Undermining this by disclosing information which is voluntarily supplied by individuals to assist the HSE perform its statutory functions would not be in the public interest, as it is important that there is trust in a regulator so it can have open and frank communications with individuals in order that it can make the right decisions.

91. There is a significant public interest in ensuring that the HSE, with its statutory functions under the HSWA to ensure that employers are regulated, can operate efficiently and effectively, something which the Commissioner has determined would be negatively affected by disclosure. Against this, she does not consider the arguments for disclosure outweigh the public interest in maintaining the exemption.
92. In view of the above, the Commissioner has concluded that, in all the circumstances, the weight of the public interest lies with maintaining the exemption under section 30(1)(b) of the FOIA.

Procedural matters

Section 17 – refusal of request

93. Section 17(1) of the FOIA states that where a public authority intends to refuse a request for information on the grounds that it is subject to an exemption in Part II of the FOIA, it must issue the requester with a refusal notice explaining the exemptions relied upon and why they apply (if not apparent), no later than 20 working days after the date on which the request was received.
94. In this case, the HSE failed to issue the requester with a valid refusal notice within 20 working days. The Commissioner therefore finds that the HSE breached section 17 of the FOIA.

Other matters

Internal review request

95. The Commissioner notes that the time taken for the HSE to respond to the internal review request exceeded 40 working days. Although there is no statutory time set out in the FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total

time taken exceed 40 working days. The Commissioner therefore recommends that the HSE review the Section 45 code of practice.³

Submissions to the Commissioner

96. Whilst the Commissioner agrees that the HSE is entitled to withhold the requested information, she has concerns about the way in which the HSE responded to her enquiries. In particular, the HSE failed to respond to the Commissioner's enquiries within any of the deadlines set by the Commissioner.
97. The Commissioner therefore recommends that the HSE review its handling of this request and complaint to ensure lessons are learned and improvements made.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

98. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

99. 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.

100. 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
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