

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 June 2007

Public Authority: Health and Safety Executive
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Summary

The complainant asked HSE for a full and factual report of a fatal accident at the premises of Leyland Trucks. HSE provided some information, redacted to remove personal information under section 40, but withheld the analysis section of the report of its Inspector's investigation under section 30 and certain other information provided by the company under section 41. It also cited those exemptions as grounds for withholding witness statements. The complainant subsequently asked HSE for a copy of the company's internal report of the accident, but HSE said that it did not hold one. The Commissioner held that HSE had correctly applied sections 30, 40 and 41 to the withheld information, and accepted that HSE did not hold the company's report and were thus not required to release it.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision. The full text of the statutory provisions mentioned in this Notice is set out in the Legal Annex to the Notice.

The Request

2. On 14 February 2005, under the Act, the complainant asked the Health and Safety Executive ('HSE') for "a full and factual report into the accident at Leyland Trucks (the company) on 7 November 2001 in which [MS] lost his life".
3. HSE replied on 17 March 2005, releasing certain documents although editing out personal information under section 40 of the Act. HSE said that it was withholding

the analysis section of the report of the investigation by one of its Inspectors under section 30 (investigations and proceedings conducted by public authorities). HSE said that it was also withholding certain other documents provided by the company under section 41 of the Act (information provided in confidence); it could only disclose these documents with the consent of the company, if provided with proof that legal proceedings had commenced, or under a court order. HSE offered to ask the company for their consent to the release of that information, if the complainant so wished. HSE further said that it was withholding seven witness statements under sections 30, 40 and 41, saying that HSE could only disclose the statements with consent or under a court order. Again, HSE offered to seek the witnesses' consent to disclosure, if that was the complainant's wish. It also said that it had asked the Coroner for his consent to the release of his letter of 5 December 2001 to HSE. This was duly given, and on 18 April 2005 that letter was forwarded to the complainant.

4. On 22 June 2005 the complainant sought an internal review of HSE's decision, seeking all of the withheld information. She also requested a copy of the company's internal report into the accident. On 5 July 2005 HSE wrote to the complainant acknowledging the review request and saying that it was treating her request for information supplied by the company as a separate matter.
5. On 9 August 2005, HSE maintained the original decision not to disclose personal data under sections 40 and 41 and the analysis under section 30(1). HSE said that section 40 of the Act exempted from disclosure personal data as defined in the Data Protection Act 1998 and reiterated that, under section 41, the witness statements could not be released without the explicit consent of the person interviewed. HSE said that the company had refused permission for the disclosure of material provided by them to HSE, and HSE had written to them again, making it clear that the request had emanated from the complainant, and it had yet to receive a response. HSE said that it had also written to the witnesses in the same vein.
6. As to the analysis, HSE said that it believed that disclosing the information would impede future investigations and legal proceedings because, to be effective, such documents must be full and candid; effectiveness would be impeded if it became known that such documents, containing HSE's reasoning and legal considerations, were to be available under the Act. HSE recognised that section 30(1) was subject to the public interest test but said that the argument for releasing the information, namely an increase in public confidence because of increased transparency, was outweighed by the need for HSE's processes to be effective when delivering justice by means of its investigations.
7. On 5 September 2005 HSE received from the company confirmation that five documents could be released to the complainant, subject to the removal of personal information. On 15 September 2005 the complainant complained to the Commissioner that HSE had refused to release all of the relevant details.
8. Following further correspondence with the company, and telephone contact with the complainant during which she agreed that HSE could delay its reply until the company had fully responded, on 27 October 2005 HSE wrote to the complainant saying that three of the seven witnesses had consented to their witness

statements being provided and that the company had agreed to the release of a further seven documents, edited to remove personal information in accordance with section 40 of the Act. HSE said that the company had withheld consent to the release of: the name of a contractor company mentioned in minutes of a meeting of 27 November 2001; three documents prepared some time after the accident, namely 'Safe Working Procedure' dated 26 January 2002, 'Weekly Brief' for week commencing 29 April 2002 and the 'Plant Access Ladders Assessment Sheet'. HSE said that this information was exempt from disclosure under section 41 of the Act. As to the complainant's request for a copy of the company's investigation report, HSE said that it did not hold an investigation report from the company.

The Investigation

Scope of the case and Chronology

9. As stated above, on 15 September 2005 the complainant wrote to the Commissioner about the way in which her request for information had been handled, and to ask him to investigate HSE's decision to withhold some of the information relating to the accident.
10. The Commissioner contacted HSE on 17 August 2006 asking for a copy of the information withheld from the complainant. HSE provided that information on 20 September 2006. In the course of subsequent correspondence, HSE reiterated that it did not hold a copy of the report of the company's investigation into the accident.
11. HSE also subsequently provided detailed reasons for withholding from the complainant the following information:
 - Personal data contained in HSE's Incident and Investigation Reports and Investigation Summary computer printouts (consisting of the names of those mentioned in those documents);
 - Analysis section of HSE's Investigation Report;
 - Four witness statements where consent to disclose has not been given;
 - Information supplied by the company where consent to disclose has been refused (consisting of the name of a contractor company and certain documents dated after the accident – paragraph 8 above).

The Commissioner's investigation has focussed on HSE's refusal to provide that information.

Findings of fact

12. HSE has stated that it does not have a copy of a report of any internal investigation prepared by the company into the accident and that there was no mention in its investigation record that it had ever seen such a report or that such a report existed (although this should not be taken to mean that one does not exist). Under section 1(1) of the Act entitlement to information relates to information **held** by the relevant public authority. In the absence of any evidence to the contrary, the Commissioner finds that HSE does not **hold** such a report and is thus not required, and indeed would be unable, to provide it to the complainant.

Analysis

13. The Commissioner has considered carefully the complainant's representations, and HSE's responses to the complainant and its further detailed comments following the complaint to the Commissioner.

Exemptions

Section 30 (Investigations and proceedings conducted by public authorities)

14. HSE has relied on section 30(1) of the Act as its grounds for withholding the analysis section of HSE's investigation report. Information which has been held at any time by a public authority for any of the purposes listed within section 30 is exempt from disclosure, subject to the application of the public interest test. As section 30 is a class-based exemption it is not necessary for HSE to demonstrate that disclosure would prejudice the conduct of an investigation in order to engage the exemption.
15. However, the Commissioner accepts that the exemption at section 30(1) of the Act is engaged. This is because HSE has attested that the information in the analysis section had originally been held for the purposes of an investigation which might have led to HSE instituting criminal proceedings, and thus the exemption in section 30(1)(b) is applicable. Since the information in question need only to have been held **at any time**, the fact that no prosecution materialised does not affect the applicability of the exemption to the withheld information.

Public Interest Test

16. The Commissioner recognises that there is an inherent public interest in ensuring the ability of public authorities to carry out investigations. However, in the decision of the Information Tribunal in *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), the Tribunal concluded that it was incorrect to take the view that disclosing information covered by a class-based exemption such as section 30 would cause inherent damage. Therefore, the information in question

may only be withheld from disclosure where the public interest in maintaining the exemption outweighs the public interest in its release.

17. The Commissioner is mindful of the strong public interest in promoting openness and transparency in the discharge of a public authority's statutory functions. For example, disclosure of the relevant information may enable the public to understand why a particular investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out. On the other hand, there needs to be balanced the potential impact of disclosure on the success of the public authority's investigation; and the prejudicial effect that disclosure will have on the ability of the public authority to effectively perform its regulatory functions.
18. The Commissioner has considered the competing public interest arguments, in favour of maintaining the exemption and in favour of disclosure, in the context of the information held in the analysis section of HSE's report into this case. It should be made clear at this stage that the Commissioner's concern is not with the private interest of individuals, however understandable that interest might be or however sympathetic he may feel towards it. As the Information Tribunal recognised in its decision in the case of Hogan v Oxford City Council (Tribunal reference: EA2005/0026 and EA2005/0030, paragraph 61), the public interest test is only concerned with public interests, not private interests (my emphasis). While the analysis (which would not, in any event, add materially to the complainant's knowledge of the accident) will clearly be of interest to the complainant, this does not necessarily mean that there is a wider public interest that would be served by its release. It is important for public confidence in the activities of HSE that accidents should be thoroughly investigated by it, and that its ability to discharge its statutory functions should be effective and unimpeded. There will be cases where, the balance of public interest will run in favour of disclosure but the Commissioner is not satisfied that this is such a case. In all the circumstances of this case the Commissioner is of the view that, taking full account of HSE's need to be able to effectively discharge its investigative functions, the public interest in maintaining the exemption outweighs the public interest in disclosing the information requested. The Commissioner therefore finds that HSE was entitled to withhold the analysis section of its investigation report under section 30.

Section 40 (Personal Information)

19. The principal function of section 40 is to protect personal data relating to living individuals. The identities of individuals mentioned in HSE's Incident and Investigation Reports and Investigation Summary computer printouts clearly constitute personal data as they relate to personal information about third parties. The information will constitute exempt information if one of two conditions referred to in section 40(2) is satisfied. In considering the first condition the Commissioner has to consider whether or not any of the data protection principles would be breached by releasing the information. The first data protection principle requires that personal data should be processed fairly and lawfully and, in particular, that it should not be processed unless at least one of the conditions in schedule 2 of the Data Protection Act 1998 is met.

20. As stated above, the information in question comprises the names of individuals. The Commissioner accepts that the individuals concerned have not given their consent to the release of their names in this context, and had no expectation that they would be released into the public domain. Having concluded that none of the conditions in Schedule 2 of the 1998 Act are met, the Commissioner has decided that releasing the information would not constitute fair and lawful processing and would breach the first data protection principle. It should therefore remain withheld.
21. Section 40 provides an absolute exemption where disclosure of personal data about someone other than the complainant would contravene any of the data protection principles. The exemption is not, therefore, subject to the public interest test.

Section 41 (Information provided in confidence)

22. HSE has cited the exemption in section 41 of the Act as its grounds for withholding: four witness statements; the name of a contractor company mentioned in the minutes of a meeting of 27 November 2001; three documents generated after the accident, namely 'Safe Working Procedure' dated 26 January 2002, 'Weekly Brief' for week commencing 29 April 2002 and the 'Plant Access Ladders Assessment Sheet'. It is clear that this information was obtained by HSE from the witnesses and from the company and was not generated by HSE itself. The information therefore falls within the terms of section 41(1)(a) of the Act, and it is necessary for the Commissioner to consider whether its disclosure by HSE would constitute a breach of confidence actionable by those who provided the information or by any other person (section 41(1)(b)).
23. The Commissioner is satisfied that the information was provided to HSE in circumstances which created an expectation of confidentiality. HSE has approached the witnesses and the company asking them whether they were prepared to consent to the release of the withheld information. It is clear from the papers that the witness statements were volunteered to HSE on the understanding that they were confidential, and that they would only be used by HSE for the purpose of the investigation and that the witnesses wish that confidence to be preserved. Likewise, it is clear from HSE's correspondence with the company that they also believed that they were providing information to HSE in confidence in furtherance of HSE's investigation of the accident, and that the company wish that confidentiality to be maintained. The Commissioner is satisfied that, on that basis, if the requested information was to be disclosed, it would constitute an actionable breach of confidence. The Commissioner is therefore persuaded that the requested information is exempt from disclosure by virtue of section 41 of the Act. While section 41 is designated as an absolute exemption in section 2(3) of the Act, the Commissioner recognises that there is inherent in its provisions the need to consider the public interest test derived from common law. He does not, however, consider that in this instance the public interest operates in favour of disclosure.

The Decision

24. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, in that it correctly withheld the information sought by the complainant under sections 30, 40 and 41 of the Act.

Steps Required

25. There are no steps that the Commissioner requires the public authority to take.

Right of Appeal

26. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 19th day of June 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Relevant Statutory Obligations and Provisions under the Act

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 2(3) provides that –

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) –(e)

(f) in section 40 –

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(g) section 41, and

(h) section 44”

Investigations and proceedings conducted by public authorities

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

- (ii) whether a person charged with an offence is guilty of it,
- (b) 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 power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.”

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or

- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”