

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

8 December 2008

Public Authority: Health and Safety Executive Northern Ireland
Address: 83, Ladas Drive,
Belfast,
BT6 9FR.

Summary

On 18 June 2005 the complainant requested information from the Health and Safety Executive Northern Ireland (The 'HSENI') in relation his accident at work. The HSENI withheld the information on the basis that it is exempt under section 44 of the Freedom of Information Act 2000 ('the Act'). The Commissioner is satisfied that the withheld information is environmental information and so falls to be considered under the Environmental Information Regulations 2004 (the 'EIR'). However, the Commissioner is satisfied that all of the requested information is excepted from disclosure under regulation 5(3) of the EIR because it comprises the personal information of the complainant.

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 in respect of the complainant's request.

The Request

2. On 18 June 2005 the complainant wrote to the HSENI to request information as follows:

'a copy [the HSENI's inspector's] visit to [the Company] in the early part of 2002' (the request).

The request related to information concerning an investigation by the HSENI of his accident at work on 2 February 1999. The complainant had suffered serious injury when he was accidentally sprayed with a nicotine containing solution.

3. On 11 July 2005 the HSENI wrote to the complainant with its decision in relation to the request. The HSENI advised the complainant as follows.

'Unfortunately we do not appear to have a copy of [the HSENI's inspector's] Inspection Report but we do have a letter relating to a visit by our Inspectors to the premises on 16 January 2002 which was sent to [the company].'

4. The information within that letter, which is relevant to the complainant's request, was withheld from him. The HSENI advised that under article 30 of the Health and Safety at Work (Northern Ireland) Order 1978 (the Order), relating to restrictions on the disclosure of information, it was not possible to release this letter without the consent of the company. This consent was sought but was not received by HSENI.
5. On 18 July 2005 the HSENI advised the complainant of this and so the information could not be released. On 1 August 2005 the complainant wrote to the HSENI stating that he believed that such a report did exist and repeating his request for access to that report.
6. On 25 August 2005 the HSENI replied that a thorough search had been carried out and that no 'Report' could be traced. However, the HSENI again advised that the letter to the company 'covered all the salient points about the inspection.'
7. On 21 November 2005 the complainant wrote to the HSENI stating that he wished to see the *'written documentation relating to the visit of [the HSENI's inspector] to [the company] on 16th January 2002.'*
8. He also requested *'...copies, for example, of written prosecution policies and notes of meetings, etc, which led to the decision not to prosecute [the company].'*
9. On 19 December 2005 the HSENI wrote to the complainant and confirmed that no report existed but that the matters discussed at the visit to the company premises were confirmed and recorded in a letter sent to the company. The HSENI further advised that consent to the release of this letter had not been received. They also advised that under article 30 of the Health and Safety at Work (NI) Order 1978 (the 1978 Order) this information could not be released without consent, it having been obtained by the HSENI pursuant to the exercise of its statutory powers.¹
10. The HSENI claimed that the information was exempt from disclosure under section 44 of the Act. This provision exempts information where disclosure is prohibited by other legislation. At this stage the HSENI did not offer to the complainant the opportunity to seek an internal review of this decision. However, on 5 January 2006 the complainant requested such a review.

¹ Articles 16(4) and 22 of the Health and Safety at Work (NI) Order 1978

14. On 20 January 2006 HSENI wrote to the complainant and stated that it regarded the matter as closed. The Commissioner concludes therefore that no internal complaints procedure exists to provide a review of the HSENI decision to withhold the information. The Commissioner has therefore considered the complaint of 7 February 2006 to the Commissioner as an application under section 50 of the Act.

The Investigation

Scope of the Request

15. On 4 December 2006 the Commissioner commenced his investigation and wrote to the HSENI asking for copies of the requested information. He also sought the HSENI's reasons for withholding this information. The Commissioner asked whether the HSENI had considered the information to be environmental information within the meaning of regulation 2 of the EIR.
19. On 22 December 2006 the HSENI provided its detailed response to the Commissioner advising that the information was exempt under section 44 of the Act. HSENI explained that disclosure of the requested information was prohibited by article 30 of the 1978 Order. In its view disclosure under the EIR was not possible, as HSENI held this information pursuant to its legislative function (enforcement of health and safety at work legislation).
20. On 22 January 2007 the Commissioner sought details of HSENI's statutory functions. HSENI confirmed that it had revised its view and no longer considered that it held the requested information pursuant to a legislative function and therefore the information was the EIR did apply to the HSENI acting in this capacity.

Findings of fact

21. The HSENI is the lead body responsible for the promotion and enforcement of health and safety at work standards in Northern Ireland and covers all work situations subject to the Order. The HSENI undertook an investigation of the complainant's accident of February 1999.
23. The Commissioner is satisfied that the requested information is as follows:
 - a) information contained in HSENI letter of; and
 - b) information contained in the HSENI accident investigation file accident.

Analysis

Environmental Information

25. Environmental information is exempt under section 39 of the Act. That is because there is separate provision for access to such information under the EIR. Environmental information is defined at regulation 2 of the EIR as follows:

'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) 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 (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);*

28. In this case, the complainant's injuries were caused by the escape of a nicotine solution into the air in his workplace. The Commissioner has seen the information which relates to this escape into the environment and is satisfied that it is information on a substance which affected or is likely to affect an element of the environment, namely the air . The Commissioner concludes therefore the requested information is environmental information as defined by regulations 2(1)(b).

30. In this case, the Commissioner is also satisfied that requested information is environmental information under 2(1)(f) of the EIR because it is information on the state of human health and safety in as much as it is or may be affected by the state of the elements of the environment or, through those elements, by any of those factors referred to in regulation 2(1)(b) of the EIR.

Is the requested information personal data ?

35. The Commissioner must next consider whether the requested information is excepted from disclosure under the EIR.
36. Regulation 5(3) of the EIR states that, to the extent that requested information includes personal data of which the applicant is the data subject, the requirement to make information available upon request shall not apply to those personal data. 'Personal data' is defined in regulation 2(4) of the EIR as having the same meaning as in section 1(1) of the Data Protection Act 1998 ('the DPA') 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.”

40. The complainant suffered serious injury as a result of a work accident at the company's premises which was investigated by the HSENI. This investigation included a review of the company's policies and procedures as they impacted on the complainant and his working conditions. This review focussed on the cause of the accident.
3. The Commissioner has considered the guidance of the court on the interpretation of given in the case of *Durant v Financial Services Authority*² and also the Commissioner's own guidance on determining what is personal data³ on the question of when data 'relates to' an individual. The requested information in that it describes an accident in which the complainant, and only the complainant, was injured. The information also places this incident and its impact upon the complainant within the context of the health and safety policies and procedures of the company and its response to this accident. The information does affect the complainant's privacy in a professional and personal capacity. The information is biographical in a significant sense as it speaks of the complainant's professional activities and abilities as well as his state of health and those factors impacting upon his state of health.

² [2003] EWCA Civ 1746

³ ICO Data Protection Technical Guidance: Determining what is personal data. 2007.

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

45. The Commissioner is satisfied that the complainant is the focus of the requested information. The information concerns the investigation of an industrial accident in which the complainant was seriously injured.
46. Further, the Commissioner is satisfied that the complainant can 'be identified' from the data or from those data and other data within the possession of the HSENI.
47. The Commissioner has considered the requested information and notes that the information is held in a file referenced by a file number, the name of the company and also the name of the complainant. The Commissioner is satisfied that the requested information is the structured personal data of the complainant. The Commissioner recognises that certain of the information contained within the requested information may be personal data of persons other than the complainant. The Commissioner is satisfied that this in no way prevents the requested information also being the personal data of the complainant.
48. Accordingly, the Commission finds that the requested information is personal data of which the complainant is the data subject and that the exception under regulation 5(3) is engaged in respect of the requested information.

Effect of the of the Health and Safety at Work (NI) Order 1978

49. The Commissioner also finds that the statutory prohibitions under of the Health and Safety at Work (NI) Order 1978 can not act as a bar to disclosure to information under the EIR by virtue of Regulation 5(6). This provision states:

'Any enactment or rule of law that would prevent the disclosure of information in accordance with these regulations shall not apply'

The Decision

49. The Commissioner's decision is that the public authority was not obliged to disclose the requested information under the Regulations by virtue of the exception under regulation 5(3) of the Environmental Information Regulations 2004.

Steps Required

50. No steps are required to be taken by the HSENI in relation to the Commissioner's consideration of this request under the Environmental Information Regulations 2004.

Other matters

51. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

52. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. Therefore, in relation to the request, the Commissioner will go on to make an assessment under section 42 of the DPA as to whether the information in question in this case should be disclosed to the complainant under this access right. However, this assessment will be dealt with separately and will not form part of this decision, because an assessment under section 42 of the DPA is a separate legal process from the consideration of a complaint under section 50 of the Act.

Right of Appeal

53. 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 8th day of December 2008

Signed

Steve Wood
Assistant Information Commissioner

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

Appendix 1:

Relevant Statutory Obligations under the Act

1. **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.’

2. **Section 17 (1)** provides that –

‘A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or*
- on a claim that information is exempt information*

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.’

3. **Section 44(1)** provides that –

‘Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.’

Section 44(2) provides that –

‘The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).’

Appendix 2:

Relevant Statutory Obligations under the EIR

1. Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

‘the Act’ means the Freedom of Information Act 2000(c);

‘applicant’, in relation to a request for environmental information, means the person who made the request;

‘appropriate record authority’, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

‘the Commissioner’ means the Information Commissioner;

‘the Directive’ means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

‘environmental information’ has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (g) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (h) 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 (a);
- (i) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (j) reports on the implementation of environmental legislation;
- (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (l) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and

built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

'historical record' has the same meaning as in section 62(1) of the Act;

'public authority' has the meaning given in paragraph (2);

'public record' has the same meaning as in section 84 of the Act;

2. **Regulation 5 - Duty to make available environmental information on request**

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.