

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2015

Public Authority: Healthy and Safety Executive (HSE)
Address: Redgrave Court
Merton Road
Bootle
Liverpool
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested information relating to the Elgin blowout. The HSE refused to disclose the requested information under section 30(1)(b) FOIA.
2. The Commissioner's decision is that the HSE has correctly applied section 30(1)(b) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 25 September 2014 the complainant requested "facts in the possession of the HSE, that describe the events of the Elgin blowout? I'm referring here to the facts that were both uncovered by your two year long investigation, and by Total in their in house investigation, and passed on to you."
5. On 30 October 2014 the HSE responded. It said it would not be able to release the requested information under FOIA.
6. The complainant requested an internal review on 31 October 2014. The HSE sent the outcome of its internal review on 25 November 2014. It confirmed that it was withholding the information it held, Total's report

of their internal investigation into the blowout on the G4 well on their Elgin Installation, under section 30(1)(b) FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 2 January 2015 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether section 30(1)(b) FOIA was applied correctly to the withheld information in this case.

Reasons for decision

9. Section 30(1)(b) of FOIA states that:-

*“(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—
(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”*

10. This is a class-based exemption that is qualified by a public interest test. This means that if the information described in the request matches the description of information set out in section 30(1)(b) then the exemption is engaged and the information is exempt from disclosure. However, it can only be withheld from disclosure if the public interest in maintaining that exemption outweighs the public interest in disclosure.

Is section 30(1)(b) engaged?

11. The HSE explained that the withheld information is exempt as it is held by HSE for the purposes of an investigation which HSE has a duty to conduct with a view to it being ascertained whether a person/dutyholder should be charged with an offence, and whether a person/dutyholder charged with an offence is guilty of it. The HSE explained that it is required under the Health and Safety at Work Act 1974 (the 1974 Act) to investigate accidents at work to establish whether any criminal offences have taken place. Section 18 of the 1974 Act provides that “it shall be the duty of the Executive to make adequate arrangements for the enforcement of the relevant statutory provisions”. The “relevant statutory provisions” are defined in section 53(1) of the 1974 Act as meaning “(a) the provisions of [Part 1 to the 1974 Act] and of any

health and safety regulations; and (b) the existing statutory provisions". Part 1 of the 1974 Act includes duties to ensure the health and safety of people at work, and the creation of criminal offences.

12. The HSE explained that a major difference between the operation of the HSE in Scotland, compared to its operation in England and Wales, is that HSE cannot institute criminal proceedings in the Scottish courts. In Scotland, HSE does not have the power to raise any criminal proceedings. That power rests with the Crown Office and the Procurator Fiscal Service (COPFS). HSE inspectors investigate matters, and report those matters to COPFS. HSE also offers a legal analysis to COPFS setting out whether it considers an offence has been committed, and makes recommendations to COPFS about whether a criminal offence has been committed which should be prosecuted by COPFS. Ultimately, the decision about whether criminal proceedings will be raised is taken by COPFS. However, HSE's report and recommendations, and the information it has gathered in the course of its investigation, are passed to COPFS and are held by COPFS for the purpose of both making the decision to raise proceedings against any person, and subsequently to determine whether a person charged with an offence is guilty of it.
13. 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 but the power to institute criminal proceedings then rests with COPFS. The Commissioner does therefore consider it would fall within the class of section 30(1)(b) FOIA.
14. As noted above, section 30(1)(b) is subject to a balance of public interest test by virtue of section 2 of the FOIA. This means that the exempt information must be disclosed unless the public interest in maintaining the exemption cited by the HSE outweighs the public interest in disclosure.

Public interest test

Public interest in favour of disclosure

15. The HSE acknowledged that there is a public interest in ensuring that information is accessible to the public, ensuring that HSE is accountable to the public, and that, where appropriate, decision making processes are open to public scrutiny.

16. The complainant has argued that there has been no indication from the HSE or the Procurator Fiscal, as to whether they expect a prosecution ever to take place or whether this might be any time soon. Meanwhile he argues that ignorance of what went on, in the run up to, and during the Elgin blowout, continues to endanger lives in the oilfield in the UK and internationally.

Public interest in favour of maintaining the exemption

17. The HSE has argued that there is a very strong public interest in ensuring that the criminal justice system is able to operate effectively, in the decision-making about whether a person/dutyholder should be charged with an offence, and whether a person/dutyholder charged with an offence is guilty of it. Disclosure in this ongoing case would be contrary to the administration of justice, particularly given the stage that the investigation has reached, and the fact that key decisions about whether to institute criminal proceedings are still being taken. It would be contrary to the public interest for information about this case to be disclosed which would prevent COPFS from having the required private space to consider the evidence and HSE's recommendations to determine, free from outside influence, whether or not to raise criminal proceedings.
18. It has also argued that disclosure would also impact negatively on HSE carrying out the public functions with which it has been entrusted, to ensure the health and safety of individuals. Any such undermining of the enforcement of health and safety laws is also clearly contrary to the public interest, and is a factor weighing heavily in support of maintaining the exemption.

Balance of the public interest

19. 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 in the oilfield in the UK and internationally. However from the arguments provided by the complainant and the HSE, it is apparent that a decision in relation to whether or not to institute criminal proceedings has not yet been taken. As this decision is yet to be taken, the Commissioner considers that there is a very strong public interest allowing the HSE to fulfil its statutory functions in relation to enforcement of health and safety laws and in ensuring that the criminal justice system, in relation to this, is able to operate effectively. The Commissioner considers that section 30(1)(b) FOIA was applied correctly by the HSE to the withheld information in this case.

Right of appeal

20. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

21. 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.
22. 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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