

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 July 2015

**Public Authority:** Health & Safety Executive  
**Address:** Redgrave Court  
Merton Road  
Bootle  
Liverpool  
L20 7HS

#### **Decision (including any steps ordered)**

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1. The complainant has requested the names of witnesses and their statements in relation to a Health and Safety Executive (HSE) investigation into an incident. The HSE withheld this information on the basis of section 40(2) of the FOIA as it considered the information to be personal data.
2. The Commissioner's decision is that the HSE has correctly withheld this information under section 40(2) and he requires no steps to be taken.

#### **Request and response**

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3. On 14 January 2015, the complainant wrote to the Health and Safety Executive (HSE) remaking an earlier request from 29 May 2014. They requested information in relation to an incident on 12 October 2013 and the request was in the following terms:

*"As part of our investigations we require sight of the following from you:*

- 1) *Copy reports, memorandums, emails and all written correspondence and communications associated with the incident including notes of telephone conversations and locus inspections made by your officers and employees of the HSE in connection with the matter.*

- 2) *Copy letters issued by any officer and employee of HSE to all parties in connection with the matter with regard to the results or findings of the HSE investigations.*
  - 3) *Copy statements or precognitions taken by HSE staff in connection with this matter.*
  - 4) *Details of what improvements or notices, if any, were issued by the HSE to the parties concerned."*
4. The HSE responded on 10 February 2015. It confirmed it held information within the scope of the request and disclosed the majority of this to the complainant. The HSE continued to withhold seven witness statements on the basis of section 40(2) of the FOIA as well as redacting the names of the witnesses from the information that was disclosed.
  5. Following an internal review the HSE wrote to the complainant on 23 March 2015. It stated that it upheld the decision to withhold this information.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 30 March 2015 to complain about the way their request for information had been handled.
7. During the course of his investigation HSE confirmed to the Commissioner that it was aware that two of the witnesses had been named in a newspaper article and as such it now considered it did not need to rely on section 40(2) to redact their names from the information already disclosed to the complainant. However, it maintained the names of the remaining five witnesses should continue to be redacted from the reports disclosed to the complainant.
8. The Commissioner considers the scope of his investigation to be to determine if the HSE has correctly withheld the names of five of the witnesses and the seven witness statements on the basis of section 40(2) of the FOIA.

### **Reasons for decision**

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#### **Section 40(2)**

9. Section 40(2) states that a public authority is not obliged to disclose information if to do so would constitute a disclosure of personal data and

if this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

10. The Commissioner has gone on to consider whether or not the HSE has correctly applied section 40(2) to withhold the witness statements and names of the witnesses.
11. The DPA defines personal data as:

*"...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 data controller or any person in respect of the individual."*

*Is the withheld information personal data?*

12. The Commissioner has reviewed the withheld information in this case. Three of the witness statements do not contain eyewitness accounts of the incident but do contain the employment history, training and qualifications and details of the witness' role. One of the statements contains this information and also describes the team who were working on the day of the incident and their roles and qualifications. The final three statements are from the individuals who were eyewitnesses to the incident and contain descriptions of what happened as well as general information such as in the first three statements.
13. Each of the statements contains information from which the witnesses could be identified either by name or by a description of their role and qualifications or from a description of events and other information that may otherwise be available to the public. The names which have been redacted from the other information which has been disclosed clearly identify the witnesses.
14. For these reasons the Commissioner is satisfied the withheld information constitutes personal data, as defined by the DPA.
15. The Commissioner notes the complainant does not agree that the witness statements in their entirety would constitute personal data. The complainant has stated that what a person witnessed or what they know about the circumstances surrounding the incident would not be personal data about them.

16. The Commissioner finds that as the witness statements all contain some detail of the roles, qualifications and training each of the witnesses has it is reasonable to conclude that this information could be linked to a specific individual, at the very least by other employees within the company. Due to the information within the witness statements and the local press interest in the incident, the Commissioner considers it would be possible for the witnesses to be identified from the statements. Redaction would therefore be of no use and the statements in their entirety constitute personal data.
17. The Commissioner will now go on to consider whether disclosure of this information would be unfair and/or unlawful.

*Would disclosure be unfair and/or unlawful?*

18. The HSE stated that due to the nature of its regulatory remit, individuals providing information to it would reasonably expect the contents of such information to remain private and confidential.
19. In considering whether disclosure would be fair the Commissioner takes into account the following factors:
  - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
  - The individual's reasonable expectations of what would happen to their information; and
  - Balancing the rights and freedoms of the data subject with legitimate interests.
20. The Commissioner has considered the information redacted and withheld under section 40(2) and the fact that individuals providing information to an organisation with a regulatory remit such as the HSE would have had no reasonable expectation that information they provide as part of an investigation would be made publicly available.
21. The Commissioner's view is that when considering what information individuals should expect to have disclosed about them a distinction should be drawn as to whether the information relates to the individual's public or private life. In this case the information relates to an incident that occurred at work and contains details of the witness' roles at work and their accounts of events and their day to day experiences at work.
22. Although this information is not obviously related to each individual's private life it is also not strictly about their public life as it relates to work history and accounts of an incident. As such, the expectation of privacy is increased and the Commissioner fails to see how these

witnesses would have had any reasonable expectation that information of this type would be placed in the public domain. This is supported by the fact that the HSE, on receipt of this information request, contacted each of the seven witnesses to ask for their consent to disclose the statements. Five of the seven witnesses refused their consent and two did not respond. The Commissioner considers this strengthens the view that the witnesses had no reasonable expectation of disclosure.

23. The Commissioner has next gone on to consider whether the release of the information would cause unnecessary or unjustified harm to the individual involved. The complainant has argued that the identities of the witnesses are known as they gave evidence in court and their names are a matter of court record so disclosure of the witness statements and the names that have been redacted would not be unfair or cause any unjustified or unnecessary harm. The HSE argues that the fact the witnesses had to give evidence in court is not relevant.
24. Furthermore, the HSE has argued that it was not present at any court case and so is not in a position to know which witnesses had been called to give evidence or if these are the same witnesses the HSE called on for its investigation. HSE has identified that two of the witnesses it gained statements from were named in newspaper articles and as such can now make their names available in the information it has disclosed to the complainant but maintains the names of the other five witnesses should be exempt.
25. The Commissioner accepts the HSE's position in this regard. Whilst it is possible that some or all of the other five witnesses may have been used during the court case it is not possible for the HSE to know which, if any of them, were named and as the witnesses have not consented to the HSE releasing their statements the HSE have correctly applied caution to releasing their identities as it is reasonable that HSE may have used different witnesses to the criminal case due to the different nature of the investigations. As such disclosure of the names of the witnesses may cause unwarranted distress to these individuals.
26. The Commissioner agrees with the HSE in relation to the witness statements as the information within the statements is more than just a name and it is likely that the disclosure of the information would cause unnecessary distress to the individuals. Additionally, the incident in question was likely to have been traumatic for the witnesses to have seen so the disclosure of information which directly links them to their experience of the incident in the public domain would be unnecessarily distressing.
27. In relation to the final factor, the legitimate interest in the public knowing this information, the Commissioner has considered whether

disclosure of the information would lead to a greater infringement of the individual's legitimate right to privacy than is outweighed by the legitimate interest in disclosure.

28. The complainant has not provided any substantial arguments relating the wider interest to the public that would occur from disclosure of this information. Whilst the Commissioner notes the complainant has their own reasons for considering this information should be disclosed he must consider whether disclosure of this information into the public domain would be in the wider public interest. The Commissioner has not been convinced there is any legitimate public interest in disclosure of the identities of the witnesses or their statements relating to this incident beyond simply increasing transparency within the public authority. Balanced against this the Commissioner does consider the disclosure of this information may cause unwarranted or unjustified damage or distress.
29. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the information is therefore exempt from disclosure.

## Right of appeal

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30. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**