

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

### **Decision notice**

**Date:** 21 January 2016

**Public Authority:** The Health and Safety Executive  
**Address:** 1.G Redgrave Court  
Bootle  
Merseyside  
L20 7HS

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

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1. The complainant has requested information regarding the civil liability exclusion enacted by section 69 of the Enterprise and Regulatory Reform Act 2013 and information regarding the complaint lodged by the Association of Personal Injury Lawyers (reference CHAP (2014) 01428) (Complaint by the Commission of the European Communities concerning alleged infringement of Directive 89/391/EEC in the UK and Scotland). The HSE provided some information but withheld some information under section 40(2), 42 and 44 of the FOIA.
2. The Commissioner's decision is that the HSE has correctly applied section 42 and 44 FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 23 December 2014 the complainant requested information of the following description:
  - a. Correspondence passing between the European Commission and HSE

regarding the civil liability exclusion enacted by section 69 of the Enterprise and Regulatory Reform Act 2013; and

b. Correspondence passing between the European Commission and HSE regarding the complaint lodged by the Association of Personal Injury Lawyers (reference CHAP (2014) 01428) (Complaint by the Commission of the European Communities concerning alleged infringement of Directive 89/391/EEC in the UK and Scotland).

5. The HSE responded and refused to provide the requested information under section 44 FOIA.
6. The complainant requested an internal review on 11 March 2015. The HSE sent the outcome of its internal review on 8 May 2015. It upheld its original position, but clarified the information had been withheld under section 44(1)(b) FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 15 May 2015 to complain about the way the request for information had been handled.
8. During the course of the Commissioner's investigation the HSE disclosed some of the withheld information. In relation to the information it continued to withhold, it applied section 42, 40(2) and 44(1)(b) FOIA to this information. It confirmed that:
  - Documents 11, 12 and 15 had been disclosed in full;
  - Documents 1 and 7 had been disclosed in part. Section 40(2) FOIA had been engaged to withhold personal data relating to a third party and Section 42 FOIA had been engaged to withhold information it considers to be covered by legal professional privilege;
  - Documents 5 and 9 had been disclosed in part. Section 40(2) FOIA had been engaged to withhold personal data relating to a third party;
  - Document 13 had been disclosed in part. Section 40(2) FOIA had been engaged to withhold personal data relating to a third party and section 44(1)(b) FOIA had been engaged to withhold information it considers to be incompatible with a European Community obligation.
  - Documents 2, 3, 4, 6, 8, 10, 14 and 16 withheld in full under section 44(1)(b) FOIA.
  - Document 17 withheld in full under section 44(1)(b) and section 40(2) FOIA.

9. The complainant has confirmed that she does not want the Commissioner to consider the redactions made under section 40(2) FOIA.
10. The Commissioner has considered whether the HSE has correctly applied section 42(1) and section 44(1)(b) FOIA.

## **Background**

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11. The HSE explained that it is Britain's national regulator for workplace health and safety and its aim is to reduce work-related death, injury and ill-health. It said that it owns a significant amount of primary and secondary legislation, the primary legislation comprises Acts of Parliament, including the Health and Safety at Work Act 1974. The secondary legislation is made up of Statutory Instruments (SIs), often referred to as 'regulations'. It enforces health and safety in the UK with Local Authorities and others through a variety of methods including research, the provision of information and advice, promoting training, implementing new or revised regulations and codes of practice, and by undertaking work place inspections, investigations and enforcements.
12. It explained that in the course of 2012, the UK Government introduced and promoted before the UK Parliament the Enterprise and Regulatory Reform Bill and this Bill was passed by the UK Parliament as the Enterprise and Regulatory Reform Act (ERRA) 2013, receiving Royal Assent on the 25<sup>th</sup> April 2013. It said section 69 of this Act amended existing UK law (section 47 of the Health and Safety at Work Act 1974) concerning civil liability for breach of statutory health and safety duties, removing the link between breach of health and safety legislation and the right to bring a civil action for damages.
13. It went on that following the changes to section 69 ERRA, the Scottish TUC and the Association of Personal Injury Lawyers (APIL) registered complaints with the European Commission on the basis that the changes brought about by the new provision to section 69 of ERRA reduced the level of protection for workers to an extent which, in their opinion, rendered the UK in breach of its obligations under the Second Framework Directive [89/391/EEC]. The European Commission's investigation into this is ongoing.

## **Reasons for decision**

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### **Section 42 – redactions made within documents 1 and 7**

14. Section 42(1) FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
15. The HSE has confirmed that in this case it is relying upon advice privilege.
16. Advice privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore the information must be communicated in a professional capacity. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
17. The HSE confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
  - a. confidential;
  - b. made between a client and professional legal adviser acting in their professional capacity; and
  - c. made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.
18. In this case the HSE has explained that the first redaction made under section 42 in document 1, contains a candid exchange between HSE staff (client) and lawyers (HSE's advisory division lawyers and HSE's litigation and enforcement lawyers) advising on this case. It said that those involved in the communication are familiar enough with the case to fully comprehend the weight behind the comment and as such HSE is of the view that the information warrants protection under section 42 FOIA. It said that as this information has not been disclosed into the public domain, it has not lost its legal professional privilege.
19. In relation to the second redaction made under section 42 in document 1, the HSE explained that this was between two HSE policy officials and poses a legal question, with the lawyers advising on the case being copied into the communication. The HSE is therefore of the view that this comment represents a clear legal query between the HSE and its lawyers and as such warrants protection under section 42 FOIA. It said that as this information has not been disclosed into the public domain, it has not lost its legal professional privilege.

20. Finally in relation the information redacted under section 42 in document 7, the HSE explained that this relates to a discussion between two HSE policy officials, copied to the advising lawyer, regarding the preparation of HSE's response to the European Commission. It said that the long-running in-house relationship the HSE has with its lawyers, and the familiarity between the client and lawyers involved with this particular case and it's subject matter, has resulted in less formal instructions than one might expect in a traditional client / lawyer relationship. HSE are of the view this comment represent a clear communication between itself and their lawyer regarding the formulation of its legal response to the European Commission and as such warrants protection under section 42 FOIA. It said that as this information has not been disclosed into the public domain, it has not lost its legal professional privilege.
21. As further explanation, the HSE explained that the HSE's advisory lawyers advise HSE on a broad range of health and safety matters and corporate issues, and draft health and safety legislation. These lawyers are located in the Government Legal Department but work exclusively for HSE. The HSE's litigation and enforcement lawyers provide litigation and enforcement advice on a broad range of health and safety areas. These lawyers are located within HSE.
22. The Commissioner considers that the redacted information is confidential as it has not been made publicly available and is either between HSE staff and HSE lawyers or between HSE staff but copying in HSE lawyers regarding legal queries or matters. The HSE has confirmed that the redacted information either reflects legal advice relating to an ongoing investigation relating to this legal challenge or legal questions associated with such.
23. Upon considering the information withheld under section 42 FOIA and the submissions provided by the HSE, the Commissioner considers that the section 42 exemption was correctly engaged.
24. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.
25. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to*

*their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...".*

*"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."*

26. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted the comments of the Tribunal in *Calland v Information Commissioner* (EA/2007/0136) that the countervailing interest must be "*clear, compelling and specific*".

### **Public interest arguments in favour of disclosing the requested information**

27. The HSE has put forward the following arguments in favour of disclosure:
- Promoting openness and transparency;
  - Further understanding of government processes in decision making.

### **Public interest arguments in favour of maintaining the exemption**

28. The HSE has put forward the following arguments in favour of maintaining the exemption:
- It is recognised that the concept of Legal Professional Privilege (LPP) reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients;
  - Safeguarding openness in communications between a client and their lawyer to ensure access to full and frank legal advice;
  - The issue under investigation by the European Commission is of considerable interest to the public at large because it relates to legal changes made to Section 47 of the Health and Safety at Work Act 1974, brought about by the Enterprise and Regulatory Reform Bill in April 2013. The change limits the ability of an individual to bring civil action for damages however, disclosure of the legal advice between HSE and HSE Lawyers would not provide

the public with a greater understanding of the decision-making process that resulted in this change;

- All of HSE's regulatory functions are regulated by law and this fact ought not to undermine its right to the usual protection to legal professional privilege enjoyed by all individuals and organisations;
- Disclosure of this information to the complainant would introduce unfairness in the legal challenge because the complainant would have access to HSE's legal advice.

### **Balance of the public interest**

29. The Commissioner considers that there is a very strong public interest in promoting openness, transparency and to further public understanding in relation to this matter. This is particularly so in this case as the legal changes made by the government have been the subject of complaints to the European Commission and will have far reaching implications.
30. The Commissioner does also consider that there is a very strong public interest in the HSE being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain.
31. Upon viewing the withheld legal advice the Commissioner considers that it relates to an ongoing legal challenge. The Commissioner has not been presented with evidence that would suggest that the withheld advice has been misapplied or misrepresented in anyway.
32. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 42(1) was therefore correctly applied in this case.

### **Section 44(1)(b)**

33. Information is exempt under section 44(1)(b) if its disclosure by the public authority holding it is incompatible with any EU obligation. The exemption is not subject to a public interest test.

34. The HSE has explained that it has applied this exemption in relation to the prohibition under Article 4(2) of the direct-acting EC regulation 1049/2001.
35. It said that all of the documents to which section 44(1)(b) has been applied form part of correspondence relating to complaints made against the UK Government to the European Commission, and refer in their entirety to EU Pilot case 5376/13/EMPL, a case the European Commission is currently investigating.
36. It went on that there is an overriding obligation incumbent on European Union Member States (EU MSs) to comply with the spirit of EU law that is enshrined in Article 4 of the Treaty on EU and the Treaty on Functioning of the EU as detailed below:
  - *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the treaties.*
  - *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
  - *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.*
37. The HSE explained that it is obliged, as a Member State, to comply with Article 4.3 of the Treaty on European Union, which embodies the principle of sincere mutual cooperation. On this basis, it said that it was the HSE's view that section 44(1)(b) FOIA is engaged. It also provided the Commissioner with a communication from the European Commission, stating that disclosure of the documents to which section 44(1)(b) has been applied whilst their investigation is ongoing, could seriously undermine the investigation process. This is because it may compromise open discussion aimed at reaching an amicable solution to the dispute.
38. Upon viewing the withheld information and the arguments presented by the HSE as well as the comments made by the European Commission, the Commissioner considers that disclosure would be incompatible with Article 4 of the Treaty on European Union. Therefore the HSE correctly applied regulation 44(1)(b) FOIA in this case.



## Right of appeal

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39. 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: 0116 249 4253

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)

40. 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.
41. 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 .....**

**Gemma Garvey**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**