

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 12 December 2016

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

Decision (including any steps ordered)

1. The complainant made a request for the HSE's report on a blowout that occurred on the Elgin Offshore Well Head that resulted in the evacuation of all on board personnel. The HSE provided the complainant with the report but made redactions under regulation 12(5)(b) and 13 EIR.
2. The Commissioner's decision is that the HSE has correctly applied regulation 12(5)(b) and 13 EIR in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 11 January 2016 the complainant made a request for the report of the HSE investigation into the blowout on Total's Elgin Installation March 25 2012.
5. On 1 March 2016 the HSE responded. It did provide the complainant with a redacted copy of the requested information. It made the redactions under regulation 12(5)(b) and 13 EIR.
6. The complainant requested an internal review. It is not clear from the correspondence on my case file on what date the HSE sent the outcome of its internal review, however it upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 19 May 2016 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the HSE additionally applied regulation 13 EIR to some of the redacted information.
9. The Commissioner has considered whether the HSE was correct to apply regulation 12(5)(b) and 13 EIR in this case.

Reasons for decision

Regulation 12(5)(b)

10. Regulation 12(5)(b) EIR can be applied to withhold information where disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial, or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. In this case the HSE is relying on regulation 12(5)(b) because disclosure would adversely affect an inquiry.
11. The Commissioner has first therefore considered the exact nature of the inquiry and on what basis the HSE has a duty or power to conduct such an inquiry.
12. The HSE explained that it is a statutory body created by the Health and Safety at Work Act 1974 (HSWA) and one part of its statutory role is to investigate workplace incidents and bring those who breach health and safety legislation to account. The powers of its inspectors are set out in Section 20 of the HSWA.
13. It went on that during an investigation, the HSE gathers information such as witness statements, correspondence with the company and third parties, equipment test results, and documentary evidence including policies, procedures and risk assessments. Such information is gathered with a view to understanding the cause of an incident and establishing whether there are grounds for enforcement action, including prosecution.
14. It clarified that although HSE's investigation of the incident relevant to this case is complete, it is relying on the exception in 12(5)(b) EIR to withhold information from disclosure that it believes would adversely affect its ability to conduct current and future investigations effectively.

15. Based upon the HSE's submissions the Commissioner is satisfied that the HSE had a statutory power to conduct the investigation into the Elgin blow out which resulted in the report requested in this case.
16. The Commissioner has therefore gone on to consider how disclosure of the withheld information would adversely affect the HSE's ability to conduct such an inquiry.
17. The HSE explained that the withheld information relates to internal deliberations surrounding this serious incident and witness statements provided to the HSE during the course of its investigation. HSE is of the view that disclosure of this information could adversely affect current and future investigations.
18. HSE referred to a previous Decision Notice issued by the Commissioner under reference FS50080372 relating to the use of Regulation 12(5)(b) of the EIR. In this case the Commissioner accepted that disclosure would hinder the authority's ability to find witnesses willing to participate in investigations, once they knew that their contributions could be disclosed. This would adversely affect the authority's ability to conduct criminal investigations. He also accepted that release of the information could reveal how the authority conducted investigations – awareness of its techniques could enable suspects to evade detection or convictions.
19. It went on that it is vital HSE be able to conduct investigations thoroughly, effectively and free from the public gaze and it must therefore be in a position to discuss candidly its analysis of potential breaches of health and safety law. If its decision making process was made public, it could be used by unscrupulous duty holders to circumvent health and safety legislation thereby avoiding enforcement action. It is therefore vital this information is not disclosed into the public domain as it could be relevant to future investigations of this or other duty holders.
20. HSE are of the view that disclosure of witness statements when consent to disclose has not been provided would adversely affect its ability to investigate in the future as witnesses would be unwilling to provide voluntary statements. Although HSE has the power to compel a witness to provide a statement, it is its preference to obtain statements on a voluntary basis in order to comply with section 9 of the Criminal Justice Act. This is particularly pertinent in the initial stages of an investigation when it is gathering and establishing the facts and the provision of voluntarily provided statements is preferable. This is because there are limitations on how a compelled statement can be used in legal proceedings i.e. a compelled statement cannot be relied upon in

evidence without the witness attending court, whilst a voluntary statement can be provided if it is accepted by the defence. A voluntary statement also allows HSE to assess the quality of a potential witness.

21. HSE provided further submissions contained in the Confidential Annex attached to this Notice.
22. Whilst the Commissioner appreciates that the investigation is now complete, he considers that there is merit in the argument in this case that disclosure of the redacted information would have an adverse effect upon the relationship between the HSE and the duty holder as well as other organisations which may be investigated by the HSE. It is a well established principle that the voluntary and candid supply of information within this context is preferable and that disclosure of information which damages the relationship between duty holders and the HSE would therefore prejudice the HSE's investigatory powers.
23. The HSE has also argued that unscrupulous duty holders may try to use the redacted information to work out how to avoid enforcement action however it has not explained how this could be done or provided the Commissioner with any specific examples. The HSE has not therefore demonstrated a causal link between disclosure of the redacted information and how duty holders could use this to circumvent enforcement action thereby causing an adverse effect to HSE's investigatory powers.
24. Based upon the HSE's submissions that disclosure of the redacted information would adversely affect its ability to conduct an inquiry contained within this Notice and the Confidential Annex attached to this Notice, the Commissioner does consider that regulation 12(5)(b) EIR is engaged. The Commissioner has therefore gone on to consider the public interest test in this case.

Public interest test

Public interest in favour of disclosure

25. HSE has acknowledged the following public interest arguments in favour of disclosure:
 - HSE notes the presumption in favour of disclosure and that disclosure could promote transparency and accountability and build confidence in HSE's investigative and enforcement activities.

Disclosure could also allow individuals and companies to understand HSE's decision making process.

Public interest in favour of maintaining the exception

26. HSE has acknowledged the following public interest arguments in favour of maintaining the exception:

- HSE considers that the public interest in this case favours maintaining the exception due to the adverse effect that disclosure will have on the ability of HSE to effectively perform its regulatory functions. Disclosure would be prejudicial to its ability to communicate fully, frankly and in confidence with individuals. This would inhibit its ability to conduct future investigations thoroughly and effectively because third parties would be less willing to volunteer information.

Balance of the public interest

27. The Commissioner considers that there is a very strong public interest in the HSE operating in an open and transparent way and when investigations are complete information should be shared with the public communicating the HSE's findings. In this case the HSE has disclosed its report into the Elgin blowout with the redactions which are under consideration. However given that the HSE has disclosed a considerable proportion of the report this already goes some way to meeting the public interest in this case. However having acknowledged this, the complainant has highlighted a lot of 'gaps' that have been redacted from the report and therefore he has argued that it will be very difficult for lessons to be learned by the industry if there are significant issues that arose redacted from the shared report.
28. In this case the investigation was complete at the time of the request, however the Commissioner does consider that disclosure of the redacted information would adversely affect the HSE's ability to conduct investigations into workplace incidents both now and in the future due to the damage disclosure would cause to the voluntary supply of information and the relationship between HSE and duty holders. It is not in the public interest for HSE to be unable to fulfil its statutory role effectively. Again there is further information contained within the Confidential Annex attached to this Notice in relation to the public interest in favour of maintaining the exception.
29. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception in this case.

Regulation 13

30. Regulation 13(1) EIR provides an exception for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in regulation 13(2) or 13(3) EIR is satisfied.
31. One of the conditions, listed in regulation 13(2)(a)(i) EIR, is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
32. The Commissioner has first considered whether the withheld information would constitute the personal data of third parties.
33. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
34. In this instance the HSE has explained that some of the requested information is the personal data of the person who provided it i.e. a witness who provided a witness statement on either a voluntary or compulsory basis. Some of the withheld information from witnesses will also be sensitive personal data e.g. descriptions of how the incident affected them physically and mentally.
35. The Commissioner does consider that this is information from which the data subjects would be identifiable and therefore does constitute personal data.
36. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has initially considered whether the disclosure would be fair.
37. When considering whether the disclosure of this information under the FOIA would be fair, the Commissioner has to take into account the fact that FOIA is applicant blind and that disclosure should be considered in the widest sense – that is, to the public at large. The Commissioner is not able to take into account the unique circumstances of the complainant. Instead the Commissioner has had to consider that if the information were to be disclosed, it would in principle be available to any member of the public.
38. HSE has approached all witnesses asking them if they consent to the disclosure of their statement. Where consent has been received, their personal information has not been redacted from the released report.

39. The HSE went on that the information relates to an incident that occurred at work and contains details of the witness' roles at work and their accounts of events. In ICO Decision Notice FS50576818 (22 July 2015), the Commissioner considered that "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."
40. HSE considers a witness statement to have been provided to HSE under the expectation that it will only be used for the purposes of the investigation and would otherwise remain confidential. HSE believes that witnesses have a reasonable expectation that information that they have given in their statements will not be put into the public domain. Additionally, the incident was traumatic for some individuals and so disclosure of information which directly links them to their experience of the incident into the public domain, without their consent, would be unnecessarily distressing.
41. The Commissioner accepts that disclosure of the information withheld under regulation 13 would be distressing for the data subjects and although witness statements were provided within the context of their working lives, given the nature of the withheld information it would be reasonable to expect that this would not be shared within the public domain.
42. The Commissioner has gone on to consider whether any of the Schedule 2 conditions can be met, in particular whether there is a legitimate public interest in disclosure which would outweigh the rights of the data subject set out above.
43. Whilst the Commissioner understands that the complainant has a personal interest in the withheld information this is not a legitimate public interest. The Commissioner does consider however that there is a wider public interest in transparency surrounding such a serious incident. However the partial disclosure of the report by the HSE does go some way to meeting the legitimate public interest in this case.
44. After considering the nature of the withheld information, and the reasonable expectations of the data subjects, the Commissioner believes that disclosure under EIR would be unfair and in breach of the first principle of the DPA and that any legitimate public interest would not outweigh the rights of the data subject in this case.
45. Therefore the Commissioner believes that regulation 13 EIR is engaged, and provides an exception from disclosure.

Right of appeal

46. 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

47. 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.
48. 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

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SK9 5AF