

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

Decision notice

Date: 26 January 2017

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 information relating to an investigation carried out by the HSE into the unreported RIDDOR incident of cancer developed by a student working at a named university. The HSE provided the complainant with some information but withheld some information under regulation 12(4)(e), 12(5)(b) and 13 EIR.
2. The Commissioner's decision is that the HSE has correctly applied regulation 12(5)(b) to all documents to which it has been applied apart from documents 36, 39 and 41. The Commissioner does not consider that regulation 12(4)(e) was applied correctly to document 41 however it was applied correctly to documents 36 and 39. The Commissioner does consider that regulation 13 has been applied correctly in this case (regulation 13 has not been applied to document 41).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

 The HSE should now disclose document 41
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 January 2016 the complainant requested information of the following description:

"All records, including statements [8 witnesses were named in a footnote as to who the complainant would have expected to have been interviewed], laboratory and other records used in the investigation of the unreported RIDDOR incident of cancer developed by a student working in the [named University]. Investigation took place between Feb- August 2014. The principle investigator was [named individual].

Copies of all records (for and against), which the HSE used in its decision that cells in use in the laboratory were passaged more than 5 times and free of infected agents.

Copies of all records (for and against) the HSE's claim that [named individual's] HSE authorisation obtained in 2008 included laboratories A74 & A75. And all records (for and against) of why the HSE disregarded the actual filed HSE GMO applications for A74 & A75 (of 2011). All records of what the safety features and disposal features were in the [named individual] 2008 GMO application, including particular room or building safety, and disposal procedures. And its HSE approved procedure for rendering the cultures free of remaining lentivirus.

The procedure that [two named individuals] used, and their laboratory book records of applying that procedure. The cell bank records of the aliquots of cells banked for future use. [Two named individuals] laboratory book record of reviving those banked cells and the entries of removal in the cell bank records.

In addition, the correspondence between the HSE officers and management. The HSE's officers' notes. Any document that explains why the evidence and documents I gave were not followed up on in challenging discrepancies in other witnesses' accounts.

The reply of the University to the HSEs letter."

6. On 22 March 2016 the HSE responded. It numbered the documents it held from 1-66. It provided the complainant with document 1 with redactions made under regulation 12(5)(b) and 13 EIR. Documents numbered 2-26, 37 and 40 were disclosed but redacted under regulation 13 EIR. Documents 42-43, 47-55, 58-61, 63 and 66 were withheld in full under regulation 13 EIR. Document 65 was disclosed under the DPA. All of the other documents were withheld in full under regulation 13 or 12(5)(b) EIR. It applied regulation 12(4)(b) EIR to all other information already available to the complainant.

7. The complainant requested an internal review on 8 March 2016 in relation to the HSE's application of regulation 12(5)(b) and 13 EIR. The HSE sent the outcome of its internal review on 6 May 2016. It upheld the application of regulation 12(5)(b) EIR to documents 1, 36, 39, 41, 44, 45 to 46, 62 and 64. Additionally it applied regulation 12(4)(e) EIR to documents 1, 36, 39 and 41. It upheld the application of regulation 13 EIR to documents 1 to 3, 5 to 26, 37, 40, 42 to 43, 47 to 61, 63 and 65 to 66 (in relation to some of which the HSE said that it was refusing to confirm or deny whether information was held). It withdrew the application of regulation 12(5)(b) to withhold in full documents 56 and 57 and provided these to the complainant with redactions made under regulation 13 EIR.

Scope of the case

8. The complainant contacted the Commissioner on 29 June 2016 to complain about the way his request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would look at whether the HSE was correct to apply regulation 12(4)(e), 12(5)(b) and 13 EIR to the withheld information.
10. The Commissioner has not considered the application of regulation 12(4)(b) as the complainant did not ask the HSE to consider this at internal review and this has only been applied to information which is already available to the complainant.

Reasons for decision

Regulation 12(5)(b)

11. The Commissioner has considered the application of 12(5)(b) in the first instance, this has been applied to documents 1 (parts c and d), 36, 39, 41, 44, 45 to 46, 62 and 64.
12. 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.

13. 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.
14. 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.
15. 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.
16. 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.
17. Based upon the HSE's submissions the Commissioner is satisfied that the HSE had a statutory power to conduct the investigation relevant to the request in this case.
18. 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.
19. The HSE explained that parts c and d of document 1 contain internal deliberations and analysis as part of its regulatory function. HSE is of the view that disclosure of this information could adversely affect future investigations.
20. Documents 36 and 39 are an internal review form where specialists record their views in order to reach a decision on whether it is safe to proceed with the proposed work as part of HSE's permissioning role. This process can involve two or three people progressively coming to an agreed view. Sometimes differing specialist views are pooled together in order to make a final decision. Whilst in most cases there should be little problem with disclosing the final output i.e. the letter that goes to the duty holder, the disclosure of the form would be detrimental. This is because if reviewers were conscious of the prospect of disclosure, the nature of the process for openly debating technical issues in a candid way would be compromised. The efficiency of the deliberation process would be likely to suffer if reviewers felt unable to be frank about uncertainties and areas where they lacked knowledge.

21. Document 41 is an Enforcement Management Model assessment form, this records HSE's decision making process regarding enforcement. It is essential that HSE, as a regulator, has a safe space to make assessments without revealing the methodology used to reach decisions. If these forms were routinely disclosed, unscrupulous duty holders may elicit from them how to take short cuts and evade enforcement action.
22. Document 44 is an extract from a notebook covering cell production. The HSE explained that this was volunteered information by the duty holder on an understanding of confidentiality. Assurance was given to the duty holder that the document would be handled in confidence as the duty holder was concerned about commercial confidentiality. The notebook contains formulas equivalent to the recipe for coco cola in the field of stem cell production. Information within it is intended for a future patent. Release into the public domain would affect the voluntary supply of information from duty holders in the future and adversely affect the HSE's ability to carry out our regulatory functions. Documents 45 and 46 are similarly commercially confidential to the duty holder and were withheld for the same reasons as document 44.
23. Documents 62 and 64 were also volunteered information regarding the induction, training and supervision of a student and the techniques he was proposing to adopt with regard to his work. This information has been released to HSE as part of its regulatory functions and would not as a matter of course be put into the public domain. HSE is of the view that disclosure of this information could adversely affect the future voluntary supply of information.
24. Although HSE can obtain information from a duty holder using its powers, it prefers to obtain information on a voluntary basis as this generally aids the regulatory process. If HSE were to disclose into the public domain information it acquires during the course of its regulatory activities, it is likely that duty holders would be less willing to share information with the HSE on a voluntary basis and this in turn would impact its regulatory functions.
25. 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 could hinder the authority's ability to find witnesses willing to participate in investigations, once they knew that their contributions could be disclosed. This could 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"

26. Whilst the Commissioner appreciates that the investigation is now complete, she considers that there is merit in the argument that disclosure of the redacted information would have an adverse affect upon the relationship between the HSE and the duty holder in question 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.
27. Documents 36 and 39 contain candid reviews of activity notifications. This form does contain detailed underlying reasoning as to how decisions are reached on the quality of the notification and risk assessment however HSE has not explained whether the review of notification forms part of the investigation or whether this review is conducted despite the existence of any such investigation. The Commissioner does not therefore consider that HSE has adequately established that disclosure of this information would have an adverse affect upon its investigatory powers as it would appear that these internal review forms need to be completed to reach a decision on whether it is safe to proceed with proposed work as part of HSE's permissioning role and reviewers would not have foresight as to whether this particular work would end up subject to an investigation in the future or not.
28. The HSE has argued that unscrupulous duty holders may try to use document 41 to take short cuts or evade 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 affect to HSE's investigatory powers.
29. Based upon the HSE's submissions that disclosure of the withheld information would adversely affect its ability to conduct an inquiry the Commissioner does consider that regulation 12(5)(b) EIR is engaged in relation to all other documents it has been applied to apart from documents 36, 39 and 41. The Commissioner has therefore gone on to consider the public interest test in this case apart from in relation to documents 36, 39 and 41.

Public interest test

Public interest in favour of disclosure

30. 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

31. 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

32. 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 a substantial amount of information in response to this request. However given that the HSE has disclosed a considerable proportion of the requested information this already goes some way to meeting the public interest in this case.
33. In this case the investigation was complete when the complainant made his request however the Commissioner does consider that disclosure of the redacted information would adversely affect the HSE's ability to conduct investigations into such 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.
34. 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.
35. As the Commissioner has not upheld the application of regulation 12(5)(b) EIR to document 36, 39 and 41 she has gone on to consider the application of 12(4)(e) EIR to these three documents.

Regulation 12(4)(e)

36. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is subject to a balance of public interest test.
37. The Commissioner's published guidance on this exception¹ addresses the issue of internal communications. Essentially, an internal communication is a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal.
38. The HSE explained that documents 36, 39 and 41 are internal documents and have not been shared outside of HSE.
39. The Commissioner has seen the withheld information and is satisfied that it falls within the class of information described in regulation 12(4)(e). She is therefore satisfied that regulation 12(4)(e) is engaged. She has therefore gone on to consider the public interest test in relation to this information.

Public interest test

Public interest in favour of disclosure

40. 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.
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Public interest in favour of maintaining the exception

41. HSE has acknowledged the following public interest arguments in favour of maintaining the exception:
 - The withheld information contains inspector opinion and details the rationale used to determine a specific course of action. It is imperative that HSE as a regulator has a safe space to conduct its analysis of potential breaches of legislation and the appropriateness or otherwise of proceeding with formal enforcement action. If HSE's decision making process was made

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https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf

public it could be used by unscrupulous dutyholders to circumvent health and safety legislation thereby avoiding enforcement. This would not serve the interests of the public at large.

Balance of the public interest

42. 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 a substantial amount of information in response to this request and in the Commissioner's view this goes some way to meeting the public interest in this case.
43. The Commissioner does accept that there is a public interest in HSE, as a regulator, having a safe space to conduct its analysis of potential breaches of legislation and the appropriateness or otherwise of proceeding with formal enforcement action. However in this case the investigation was complete at the time the request was made.
44. In relation to document 41 the HSE has argued that 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 and this would not serve the interests of the public at large. However the HSE has not explained how this could be done or provided the Commissioner with any specific examples and therefore the Commissioner has not attributed significant weight to this argument. In relation to documents 36 and 39, the HSE has also argued that if reviewers were conscious of the prospect of disclosure, the nature of the process for openly debating technical issues in a candid way would be compromised. The efficiency of the deliberation process would be likely to suffer if reviewers felt unable to be frank about uncertainties and areas where they lacked knowledge and this would not be in the public interest.
45. Taking into account the nature and contents of the withheld information, whilst document 41 demonstrates high level factors HSE considers within an investigation it does not provide any significant detail relating to thought processes behind decisions taken in this case. However documents 36 and 39 contain significant detail relating to thought processes behind decisions taken when activity notifications are reviewed. On balance therefore the Commissioner considers that the public interest in favour of maintain the exception is outweighed by the public interest in disclosure in relation to document 41. In relation to documents 36 and 39 however, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public

interest in favour of maintaining the exception. Document 41 should therefore be provided to the complainant.

Regulation 13(1)

46. Regulation 13(1) EIR provides an exemption 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.
47. 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.
48. The Commissioner has first considered whether the withheld information would constitute the personal data of third parties.
49. 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.
50. In this instance the HSE has explained it has withheld some witness statements in full and has redacted names and contact details from some of the information provided to the complainant.
51. The Commissioner does consider that this is information from which the data subject would be identifiable and therefore does constitute personal data.
52. 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.
53. 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.
54. 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 information.

55. 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."
56. 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.
57. The Commissioner has however 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.
58. 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 an investigation. However the partial disclosure of information by the HSE does go some way to meeting the legitimate public interest in this case.
59. After considering the nature of the withheld information, and the reasonable expectation 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.
60. Therefore the Commissioner believes that regulation 13 EIR is engaged, and provides an exception from disclosure.

Regulation 13(5)

61. Regulation 13(5) states that, "For the purposes of this regulation a public authority may respond to a request by neither confirming nor

denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that – (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded;”

62. In this case, because the complainant named 8 individuals she considered would have provided witness statements, the HSE has refused to confirm or deny whether this information is held as it considers that it would breach the data protection principles to do so.
63. The Commissioner does consider that confirming or denying whether witness statements are held for particular named individuals would identify those individuals and give away whether or not they were interviewed as part of the HSE’s investigation. The Commissioner does consider that this information, if held, would constitute the named individuals personal data.
64. HSE has explained that the names of individuals from which it has taken statements will always remain confidential unless the individual consents to disclosure of their name or a Court directs us to disclose their names.
65. The HSE has therefore refused to confirm or deny whether witness statements are held for the individuals named by the complainant unless the witness has consented to disclosure.
66. The Commissioner considers that witnesses would expect their participation in the HSE investigation to remain confidential and that this involvement would not be confirmed under FOIA. For the same reasons as discussed under the application of regulation 13(1) above, the Commissioner considers that it would be unfair to confirm whether witness statements are held for particular individuals (unless the witness consents) and any legitimate public interest (again identified above) would not outweigh the rights of the data subjects.

Right of appeal

67. 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

68. 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.

69. 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

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SK9 5AF