

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2017

Public Authority: Health & Safety Executive Northern Ireland
Address: 83 Ladas Drive
Belfast
BT6 9FR

Decision (including any steps ordered)

1. The complainant has requested information relating to the collapse of a wind turbine at Screggagh, County Tyrone, Northern Ireland. The Health and Safety Executive Northern Ireland ("HSENI") disclosed some of the requested information, however it stated that some of the requested information ("the withheld information") was exempt from disclosure, citing the exemptions under sections 30(1)(b), 40(2) and 44(1) of the FOIA. The HSENI also stated that it did not hold part of the requested information.
2. The Commissioner's decision is that the HSENI has correctly applied section 44(1) to the relevant parts of the requested information, namely the redactions under section 44(1) made to pages 73-93 of the information, and does not hold part of the requested information. However, in relation to the requested information withheld under section 30(1)(b) of the FOIA, the Commissioner has decided that, whilst the exemption is engaged, the public interest in all the circumstances of the case is weighted in favour of disclosure. In relation to the information redacted under section 40(2) of the FOIA, the Commissioner has decided that the HSENI has correctly applied section 40(2) to some of that information, however it has been incorrectly applied to the remainder.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:-

- To disclose the information withheld under section 30(1)(b) of the FOIA and some of the information withheld under section 40(2) to the complainant.
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 25 January 2016, the complainant wrote to the HSENI and requested information in the following terms:

"I am writing to request information under the Environmental Information Regulations 2004/Freedom of Information Act 2000. In order to assist you with this request, I am outlining my query as specifically as possible.

I would refer you to the collapse of a wind turbine at Screggagh, County Tyrone on 2nd January 2015. In this regard:

- 1) Please provide all information on how and by whom this incident was notified to HSENI and details of your response;
- 2) Please provide all minutes and meeting records in which the format and extent of the investigation was agreed, including with the wind turbine owner/operator;
- 3) Please provide all information on the operation of, and success or failure in operation of, the remote monitoring system in use by the wind turbine owner/operator, including in the period prior to the collapse;
- 4) Please provide all information, reports and findings on the investigation into this incident by HSENI independent of the wind turbine owner /operator, including the setting of the parameters of the investigation and the assessment of the condition of the remaining turbines;
- 5) Please provide evidence of the extent of investigations by HSENI concerning the incident itself and the period prior to the collapse with third parties, to include affected persons and those potentially at risk, by means of canvassing opinions, interviews or correspondence with residents, road users and witnesses;

- 6) Please provide any information on any resulting risk assessment by HSENI on the continuing operation of this wind farm;
- 7) Please provide any information supporting the decision to permit the resumption of operation of the wind farm.

I would be interested in any information held by your organisation regarding my request. I understand that I do not have to specify particular files or documents and that it is the department's responsibility to provide the information I require. If you need further clarification, please contact me by e-mail. I would like to receive the information in an electronic format if possible, but should this not be available, a hard copy will suffice."

6. The HSENI responded on 7 April 2016. It stated that it did not hold some of the requested information, provided the complainant with some of the requested information, and withheld the remainder, citing sections 40(2) and 44(1) of the FOIA.
7. Following an internal review the HSENI wrote to the complainant on 29 July 2016. It stated that it was upholding the original decision. Following the complainant contacting the Commissioner, the Commissioner wrote to the HSENI seeking its detailed submissions as to the application of the above exemptions. The HSENI responded to the Commissioner on 30 September 2016, providing such submissions and citing an additional exemption, section 30(1)(b) of FOIA, which it considered applied to part of the requested information.

Background to the request

8. On 2 January 2015, a 328 foot tall wind turbine in Screggagh, County Tyrone, Northern Ireland, collapsed. The wind turbine was reported to be worth £2 million. No-one was injured due to the collapse. The HSENI carried out an investigation into how the collapse occurred.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, the complainant was concerned about the redactions made to the information between pages 73 and 93 of the information provided by the HSENI in response and the HSENI's statement that it does not hold any aerial images within the scope of the complainant's request.
10. The Commissioner has considered these aspects of the HSENI's handling of the complainant's request. The HSENI has applied the exemptions to other parts of the requested information; however the

complainant has only asked the Commissioner to investigate the application of the exemptions to pages 73-93 of the information.

Reasons for decision

Section 44(1) of the FOIA

11. Section 44 is an absolute exemption, which means that if information is covered by any of the subsections in section 44 it is exempt from disclosure. It is not subject to a public interest test.
12. Section 44 of the FOIA states that:
 - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
 - (a) is prohibited by or under any enactment,
 - (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.
13. In this case, the applicable subsection is section 44(1)(a). This is commonly known as a statutory bar to disclosure. In this case, the HSENI argues that Article 30 of the Health and Safety at Work (Northern Ireland) Order 1978 provides a statutory bar to disclosure of some of the requested information.
14. Article 30(6) of the above Order states that:-

“A person shall not disclose any information obtained by him as a result of the exercise of any power conferred by Article 16(4)(a) or 22 (including, in particular, any information with respect to any trade secret obtained by him in any premises entered by him by virtue of any such power) except—

 - (a) for the purposes of his functions; or
 - (b) for the purposes of any legal proceedings or any investigation or inquiry held by virtue of Article 16(2) or for the purposes of a report of any such proceedings or inquiry or of a special report made by virtue of Article 16(2); or
 - (c) with the relevant consent.
15. The Commissioner considers that the HSENI obtained the relevant information as a result of its power of investigation and reporting as set out in Article 16(2) of the Health and Safety (Northern Ireland)

Order 1978. Therefore, the Commissioner considers that the information withheld under section 44(1) of the FOIA is caught by Article 30(6) of the Order.

16. Article 30(6) (a) to (c) sets out various circumstances under which such information can be disclosed. The Commissioner considers that the relevant circumstance in this case is that set out in Article 30(6)(c), i.e. 'with the relevant consent.'
17. The HSENI has informed the Commissioner that it has obtained consent to disclosure of the information obtained from one of the two parties involved, and has disclosed this to the complainant, however the other party did not consent to such disclosure.
18. The Commissioner has therefore concluded that section 44(1)(a) of the FOIA is engaged, through the provisions of Article 30(6) of the Health and Safety at Work (Northern Ireland) Order 1978, and that the HSENI was correct to withhold the relevant part of the requested information. As section 44 is an absolute exemption the Commissioner is not required to carry out a public interest test.

Section 30(1)(b) of the FOIA

19. Section 30(1)(b) provides that information is exempt if it has been held at any time for the purposes of 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 the power to conduct.
20. The phrase "at any time" means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose. Section 30 is also a class based exemption. This means that it is not necessary to demonstrate that disclosure would lead to any kind of prejudice in order to engage the exemption, only that the request falls within the class of information which the exemption is designed to protect. Section 30(1) can only be relied upon by public authorities that have a duty to investigate whether someone should be charged with an offence.
21. The withheld information in this case comprises an investigation report into the collapse of a specified wind turbine in Northern Ireland.
22. The HSENI conducted the investigation as per its statutory functions and powers, which are set out in the Health and Safety at Work (Northern Ireland) Order 1978 and prepared its report accordingly.

23. The Commissioner has reviewed the withheld information and is satisfied that the investigation was carried out to ascertain whether any potential criminal breach of Health and Safety legislation has been committed. It is also clear that the HSENI has the power to investigate such potential criminal breaches of Health and Safety legislation and to institute proceedings. Therefore, the Commissioner is satisfied that the section 30(1)(b) exemption is correctly engaged and she has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest factors in favour of disclosure

24. The HSENI acknowledged that there is a public interest in ensuring that information is accessible to the public, ensuring that HSENI is accountable to the public, and that, where appropriate; decision making processes are open to public scrutiny.
25. The HSENI also acknowledged that disclosure of the withheld information would be a means of allowing people to determine whether HSENI has acted appropriately and is discharging its statutory functions in respect of the wind turbine incident.
26. The complainant makes the argument for disclosure of the withheld information on the basis that the issue of the wind turbine collapse at Screggagh is of fundamental importance to the general public in Northern Ireland. Northern Ireland has a much greater density of wind turbines than the rest of the UK, which has implications for the adequacy of the separation distance of wind turbines from rural residents.
27. The complainant argues that the general public, particularly those living near the site of the collapse, should be able to view the withheld information as it would assure them that a competent and technically professional investigation into the cause of the collapse was carried out. The complainant argues that this would increase public confidence in the HSENI and reassure the public in general that measures had been taken to ensure the safety of the residents by putting in place measures to prevent such a collapse occurring again.

Public interest factors in favour of maintaining the exemption

28. There is a general public interest in HSENI and its staff having 'private space' within which it can discuss/consider how best to discharge the functions of HSENI. That 'private space' allows its staff to formulate

and discuss the advantages and disadvantages of particular courses of actions or how a particular situation should be best approached.

29. The HSENI argues that the absence of this 'private space' is likely to result in a general unwillingness of officials to debate issues fully and frankly. As a result, the quality of record keeping and decision making would be adversely affected.
30. The HSENI also argues that disclosure of this type of internal information could be taken out of context and be used to undermine the quality of HSENI decisions and regulatory activities.

Balance of the public interest arguments

31. The Commissioner accepts that there is a strong public interest in accountability and transparency on the part of public authorities such as the HSENI. She also accepts that there is a strong public interest in the public scrutinising the decision-making processes of a public authority and being confident that the public authority is discharging its statutory functions. The Commissioner accords significant weight to these public interest arguments.
32. The HSENI argues that its staff need a 'private space' within which it can consider and deliberate how best to deal with particular situations. It argues that, if staff believe that such a 'private space' is not available to them, this is likely to create a 'chilling effect' which would result in HSENI officials being unwilling to fully and frankly express their views, which would have an adverse effect on the quality of record-keeping and decision-making.
33. The Commissioner notes that these arguments are used also with regard to many 'prejudice-based' exemptions. In such cases, the public authority would be required to demonstrate the likelihood of the prejudice. Since section 30 is a 'class-based' exemption, the Commissioner cannot require this, however she has given careful consideration to the HSENI's 'private space' and 'chilling effect' arguments.
34. The Commissioner fully accepts that there is a strong public interest in retaining the integrity of the decision-making process by maintaining a 'safe' or 'private' space in which matters can be considered and debated in order to arrive at a decision as to how to handle a particular situation.

35. The Commissioner also accepts, to some extent, the argument that there may be a chilling effect on future contributions to discussions and debate, although she is of the view that HSENI employees should be accustomed to contributing to such debates and should have enough confidence in their own views and opinions not to be deterred from contributing to future discussions. Nevertheless, the Commissioner accepts that there is some risk of such employees being reluctant to provide as much input into future discussions, which could overall be detrimental to the decision-making process and she accords some weight to this argument, as a less effective record-keeping and decision-making process could be detrimental to the workings of the HSENI, which would not be in the public interest.
36. The Commissioner has also taken into account the public interest arguments put forward by the complainant. She accepts that Northern Ireland is unique in that it has a much greater density of wind turbines than the rest of the UK, having implications for separation distances. She accepts that the collapse of the wind turbine at Screggagh Farm, although no injuries occurred to anyone, was a traumatic and worrying event for local residents, who understandably wish to be assured that all relevant safety measures have been taken to prevent the reoccurrence of such an event. She accepts that there is a very strong public interest in reassuring the public that the HSENI carried out a competent and technically professional investigation into the collapse. The unredacted sections of the information already disclosed to the complainant go some way towards addressing this, however the Commissioner is of the view that disclosure of the information withheld under section 30(1)(b) would provide further reassurance.
37. On balance, having viewed the withheld information and taken into account all public interest arguments for and against disclosure, the Commissioner has concluded that the public interest in reassuring the public that a thorough and professional investigation was carried out, and that measures were taken to prevent a re-occurrence, is extremely significant and that therefore the public interest in disclosure outweighs the public interest in maintaining the exemption.

Section 40(2) of the FOIA – personal data of third parties

38. Section 40(2) FOIA 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 section 40(3)(a)(i) is satisfied.

39. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
40. The Commissioner has first considered whether the withheld information would constitute the personal data of third parties.
41. 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.
42. In this instance the HSENI has explained that the information redacted under section 40(2) of the FOIA includes names of individuals involved in dealing with the aftermath of the collapse of the wind turbine. The Commissioner does consider that this is information from which the data subjects would be identifiable and therefore does constitute personal data.
43. 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.
44. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
 - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, e.g. established custom or practice within the public authority; and

- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
45. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
46. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
47. The information redacted under section 40(2) of the FOIA consists of the names of individuals. The Commissioner has looked at the first two names redacted, which are the name of a member of the public who reported the collapse to the HSENI and the name of the Out of Hours HSENI inspector who attended the site of the collapse.
48. In relation to the member of the public, this individual's details are not mentioned in the wide media reporting of the collapse and the Commissioner considers that the individual would not have a reasonable expectation of his/her name being disclosed into the public domain. The Commissioner further considers that damage and distress may be caused to the individual if his/her name was disclosed, as such a disclosure may bring unwanted media or other attention to the individual and his/her family. The collapse of the wind turbine was a traumatic event of which the individual may not wish to be reminded and disclosure would be likely to cause the individual unnecessary stress.
49. The Commissioner has looked at whether there is a legitimate interest in disclosure of the individual's name. She accepts that there is a legitimate public interest in accountability and transparency, however

the information which was disclosed by the HSENI shows that a member of the public reported the incident. The Commissioner does not consider that there would be any further legitimate interest in actually knowing the name of the individual concerned, certainly none that would outweigh the likely distress which would be caused to the individual by disclosure of his/her personal information.

50. In relation to the name of the member of the public, the Commissioner is therefore satisfied that the HSENI has correctly applied section 40(2) of the FOIA in this case.
51. The second name is that of the Out of Hours HSENI inspector who attended the site of the collapse. Again, the Commissioner can find no evidence of this individual's details being reported in the media at the time of the collapse and the Commissioner considers that the individual would not have a reasonable expectation of his/her name being disclosed into the public domain. Although a public sector employee, there is nothing to suggest that the inspector is a senior member of staff, who would have more of an expectation of their details being disclosed into the public domain.
52. Given that this collapse occurred over 2 years ago, disclosure now of the individual's name, as in the case of the member of the public, may similarly bring unwanted attention to the individual and his/her family. The individual was not named at the time as being the Out of Hours inspector on duty at the time of the collapse and disclosure at this point would be likely to cause distress to the individual.
53. The Commissioner accepts also in this case that there is a legitimate public interest in accountability and transparency, however the report clearly states that the collapse was attended by an Out of Hours HSENI inspector. This would satisfy the public interest in knowing that the HSENI dealt with the collapse and no further legitimate interest would be added by disclosure of the individual's name.
54. The Commissioner is satisfied that there is no legitimate interest in disclosure of the individual's name which would outweigh the likely distress caused to the individual by disclosure of his/her personal details. She has therefore concluded that disclosure of the name would be unfair and would breach the first data protection principle. The HSENI has therefore correctly applied section 40(2) to the name of the Out of Hours HSENI inspector who attended the site of the collapse.
55. In relation to the third and fourth names redacted from the requested information, the Commissioner has considered whether disclosure of these names would be unfair. The third name is that of the director of DW Consultancy Limited, a parent company of Screggagh Wind Farms (this is specified in the information and has not been redacted) and the

fourth name is that of the Head of Quality and HSE at Nordex (the wind turbine manufacturer) (these details are also specified in the unredacted disclosed information).

56. The Commissioner has examined the media reports from the time of the collapse and has ascertained that the name of the director of DW Consultancy Limited was reported in articles about the collapse and is therefore in the public domain. The name of the Head of Quality and HSE at Nordex is not mentioned in the media reports so far as the Commissioner can ascertain, however an Internet search will reveal the name of this individual. The Commissioner is therefore satisfied that the name of the Head of Quality and HSE at Nordex is in the public domain.
57. Although the information is already in the public domain, the Commissioner has considered the context in which it is in the public domain and whether disclosure at this point would be nevertheless likely to cause distress to the individuals concerned.
58. The media reports from 2015 specify the name of the director of DW Consultancy Limited, therefore it is known that this individual was informed of the collapse. Also, as is the case with the name of the Head of Quality and HSE at Nordex, an Internet search for 'director of DW Consultancy Limited') will quickly reveal the name of the individual. Since the name of the individual is already in the public domain, and it is known that the individual was informed of the wind turbine collapse, the Commissioner has concluded that disclosure of the name is not unfair and would not breach the first data protection principle.
59. In relation to the name of the Head of Quality and HSE at Nordex, considering that a brief Internet search for that job title will reveal the name of the individual, the Commissioner is satisfied that the individual is aware of their name being in the public domain and any member of the public, viewing the unredacted disclosed information, would very quickly ascertain the name of the individual. As the individual would be aware of this, they would have a reasonable expectation of their name being disclosed in the context of the wind turbine collapse.
60. The HSENI has provided the Commissioner with correspondence from Nordex stating that they do not consent to personal details such as names and e-mail addresses of their employees being disclosed. The only such detail of a Nordex employee which is in the scope of the information being considered in this decision notice is the name of the individual as described in paragraph 59 above. Even though the individual has not given consent for their personal details to be disclosed, the Commissioner considers that, as the information is already in the public domain and easily ascertainable, and as the individual would be aware of that, disclosure of that information would not be unfair and would not breach the first data protection principle.

61. As the Commissioner considers that disclosure is not unfair, she has considered whether there is a condition in Schedule 2 which would permit disclosure.
62. Condition 6(1) of Schedule 2 of the DPA states that personal data may be processed if:-

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

63. The Commissioner considers that, in this case, there would be a legitimate public interest the disclosure of the names of the two individuals mentioned in paragraphs 55-60 above, in order to give context to the report into the collapse. This would not cause any prejudice to the rights, freedoms or legitimate interests of the two individuals concerned (the data subjects) as their personal information is already in the public domain in the context of the wind turbine collapse, and disclosure would not be likely to cause any damage or distress to those individuals.
64. The Commissioner therefore considers that disclosure of the names of the individuals in paragraphs 55-60 above would not be unfair, would not breach the first data protection principles, and would be necessary for the purposes of legitimate public interests.

Section 1(1)(a) of the FOIA – information held/not held

65. Section 1(1)(a) of FOIA states that :

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him"

66. The task of the Commissioner here is to determine whether, on the balance of probabilities, the HSENI holds any information relevant to a specific part of the request, i.e. for aerial images. Applying the civil test of the balance of probabilities is in line with the approach taken by

the Tribunal when it has considered the issue of whether information is held in past cases.

67. In deciding where the balance lies in cases such as this one the Commissioner may look at:
- Explanations offered as to why the information is not held; and
 - The scope, quality, thoroughness and results of any searches undertaken by the public authority.
68. In its initial response to the complainant, the HSENI advised that following a search of its paper and electronic records it did not hold the aerial images.
69. The Commissioner wrote to the HSE to ascertain what searches it had carried out to determine that the information requested was not held.
70. The HSENI explained to the Commissioner that all of the information held in relation to this request is recorded on the HSENI's Case Management System (CMS). The information is collected and recorded by a HSENI Inspector (this includes details of interview notes, witness statements, emails, letters and third party correspondence). These details comprise a single electronic folder. Access to the folder is controlled via ACLs and all of the information is stored in a Electronic Document and Records Management system (EDRMS - HP TRIM).
71. The HSENI confirmed that searches were carried out in order to locate the folder containing the information alongside consultation with the Inspector involved. As the HSENI is a comparatively small organisation (approx 120 individuals) and it is divided up into operational units (Public Sector, Major hazards, Scientific Services, Transport and Utilities etc) and there is an awareness within the Organisation of the Principal Inspector responsible for a particular sector.
72. The HSENI confirmed that, alongside the electronic searches, an e-mail was sent to the Principal Inspector for the appropriate operational unit (in this case Transport and Utilities) who verified the CMS reference number and the name of the Inspector to consult in relation to the case.
73. The HSENI confirmed that it does not hold and have never held any copies of aerial images for this particular case. This also applies to any third parties holding images on behalf of HSENI. The HSENI also confirmed that, if it did hold the information it would be held as an electronic record within the EDRMS. It also confirmed that, if it

did hold the images, they may be used in any future prosecution case which may arise.

73. Having considered the background to this case and the response from the HSENI, it is the Commissioner's view that, on the balance of probabilities, the HSENI does not hold the aerial images requested.
74. The Commissioner is satisfied that the HSENI has carried out adequate searches that would have identified the information, if held. She is therefore satisfied that the HSENI dealt with the request in accordance with the FOIA and no further action is required.

Right of appeal

75. 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

76. 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.
77. 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

Deirdre Collins
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