

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

### **Decision notice**

**Date:** 30 January 2018

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

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

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1. The complainant has requested a copy of an independent investigation report by Edif ERA (a trading name of ERA Technology Ltd) and the review carried out by a Health and Safety Executive (HSE) specialist electrical inspector in relation to the cause of an accident involving the complainant. HSE withheld the information, citing the exemption under section 41 of the FOIA (information provided in confidence) as its basis for doing so.
2. The Commissioner's decision is that HSE has correctly applied section 41 of the FOIA to the withheld information. The Commissioner does not require any steps to be taken.
3. The Commissioner notes that the request and complaint have been submitted by a solicitor's firm on behalf of an individual. However, for ease of reference this decision notice will refer to them as the complainant.

#### **Background**

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4. The complainant was involved in an accident in which he was seriously injured after being thrown from a high voltage source when his right sleeve came into contact with the conducting material whilst he was walking along the side of the fence on the edge of his own property. UK Power Networks (Operations) Limited commissioned an independent investigation by Edif ERA who produced an Earthing Investigation Report on the cause of the accident. This report was reviewed by a HSE

specialist electrical inspector and HSE concluded that the accident did not meet the criteria for formal enforcement action. The complainant has told the Commissioner that he requires the report to enable him to better investigate the case against the insurers for UK Power Networks (Operations) Limited.

## Request and response

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5. On 23 February 2017, the complainant wrote to HSE and requested information in the following terms:

*"We understand that you can provide us with a copy of the independent investigation by ERA Technology Lt[d] together with the review carried out by the HSE Specialist Electrical Inspector on the basis that conclusions were reached as to the cause of this incident.*

*We would be grateful if you would provide us with this information under freedom of information."*

6. HSE responded on 13 March 2017 stating that it held the following information:

*"1. Earthing Investigation report by Edif ERA  
2. Email from HSE specialist giving opinion of said report."*

HSE provided the information in item 2 but refused to provide the information in item 1 citing section 41 of the FOIA as its basis for doing so.

7. The complainant has stated that he replied to HSE on the 5 April 2017, followed by a telephone call on the same date requesting the missing item, the Earthing Investigation Report by Edif Era. The complainant has also stated that he had a further telephone conversation with HSE on the 6 June 2017, who he says confirmed that section 41 of the FOIA conflicted with the Data Protection Act. However, the Commissioner has not been provided with evidence of this.
8. On the 8 June 2017, the complainant wrote to HSE referring to the telephone conversation of the 6 June 2017 and enclosing a copy of HSE's letter dated 13 March 2017. The complainant requested the information listed in item 1 of HSE's letter dated the 13 March 2017, the Earthing Investigation Report.
9. HSE wrote to the complainant on the 8 June 2017, referring to its previous letter dated 13 March 2017 and stating that item 1 fell under section 41 of the FOIA. HSE also reiterated that in the same letter, it

advised the complainant that he could request an internal review within two calendar months of the letter, and that the complainant was now out of time for requesting an internal review.

## Scope of the case

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10. The complainant contacted the Commissioner on the 20 June 2017 to complain about the way his request for information had been handled.
11. It is noted that the HSE refused to carry out an internal review in this case as this was requested after a period of two months. However, the Commissioner does have discretion to accept a complaint for full investigation without an internal review and she exercised her discretion in this case. This is because the request for internal review was made only a short while after the HSE's deadline and in this case she felt there would be no benefit in asking the complainant to start the process again.
12. The Commissioner considers the scope of this case is to determine whether HSE is entitled to rely on section 41 of the FOIA as a basis for refusing to provide the withheld information.

## Reasons for decision

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### Section 41 – information provided in confidence

13. Section 41 of the FOIA sets out an exemption from the right to know when the information requested is subject to a duty of confidence.
14. Section 41(1) of the FOIA states that information is exempt from disclosure if:
  - "(a) it was obtained by the public authority from any other person (including another public authority), and*
  - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*
15. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information must constitute an actionable breach of confidence.

16. The information at issue in this case comprises an Earthing Investigation Report which recorded the cause of the accident.

**Was the information obtained by HSE from another person?**

17. In its submission to the Commissioner, HSE stated that the Earthing Investigation Report was provided to it by UK Power Networks (Operations) Limited. HSE has told the Commissioner that the Solicitors representing UK Power Networks (Operations) Limited engaged Edif ERA to undertake the Earthing Investigation Report on their behalf and a copy of the report was voluntarily disclosed to HSE.
18. The Commissioner is satisfied that the information was obtained from another person and therefore the requirement of section 41(1)(a) is satisfied.

**Would disclosure of the information constitute an actionable breach of confidence?**

19. With regard to whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. That judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:
- whether the information had the necessary quality of confidence;
  - whether the information was imparted in circumstances importing an obligation of confidence; and
  - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

*Does the information have the necessary quality of confidence?*

20. For the information to have the necessary quality of confidence it must not be trivial and not otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
21. HSE has stated that it is of the view that the Earthing Investigation Report has the necessary quality of confidence because the information contained within the report is –
- a) Not trivial in nature and therefore worthy of protection;
  - b) Was disseminated to HSE on the condition it would only be used for its own statutory purposes, i.e. to establish if there had been a breach of health and safety legislation;

- c) The report is not in the public domain and therefore not accessible to the general public; and
  - d) UK Power Networks (Operations) Limited, has a genuine interest in the contents of the report remaining confidential.
22. Having regard to the above, the Commissioner would accept that the information cannot be said to be trivial as it helps to identify whether there has been any breaches of health and safety legislation. The Commissioner also accepts that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible.
23. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

*Was the information imparted in circumstances importing an obligation of confidence?*

24. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
25. HSE has told the Commissioner that the information was communicated under an explicit duty of confidence.
26. HSE has referred the Commissioner to the front page of the Earthing Investigation Report which states that the report is "*legally privileged in anticipation and contemplation of litigation*". HSE has also referred the Commissioner to page one of the Earthing Investigation Report which states that the report "*may not be reproduced or distributed outside of the recipient's organisation (either in part or in full) without permission.*"
27. HSE has stated that following receipt of the FOIA request it wrote to both UK Power Networks (Operations) Limited and Edif ERA to seek their views on the disclosure of the Earthing Investigation Report.
28. In Edif ERA's response to HSE it objected to the disclosure of the Earthing Investigation report to any third parties. Edif ERA stated that "*the report is commercially sensitive and was prepared for UK Power Networks at the request of its company solicitor in anticipation of litigation and is legally privileged.*"
29. In UK Power Networks (Operations) Limited's response to HSE it stated that it "*object[ed] to the disclosure most strongly. The report was provided by UK Power Networks to the HSE solely to assist it with its understanding of the causes of the incident, not for any other purposes,*

*least of all to allow others to pursue a claim against UK Power Networks."*

30. HSE has also explained in its submission to the Commissioner that it is *"responsible for the regulating of health and safety legislation within Great Britain and one part of [it's] statutory role is to investigate workplace incidents. HSE went on to explain that it has "powers under the Health and Safety at Work Act and associated regulations to acquire information from those under investigation on either a voluntary or compulsory basis and [it] use[s] this information to establish if those under investigation have breached health and safety legislation and if enforcement action, including prosecution is warranted."*
31. HSE has stated that UK Power Networks (Operations) Limited volunteered the Earthing Investigation Report to HSE to quickly establish the cause of the accident and it was provided in the expectation that the information would remain confidential and not be used for another purpose.
32. The Commissioner is satisfied that, due to the nature and circumstances in which the information was created and supplied by UK Power Networks (Operations) Limited to HSE, an obligation of confidence exists in this case.

Would disclosure be of detriment to the confider?

33. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the party who confided the information.
34. In its submission to the Commissioner, HSE has stated that it is of the view that providing the Earthing Investigation Report under the FOIA would cause detriment to Edif ERA, UK Power Networks (Operations) Limited and HSE. However, the Commissioner can only consider if the disclosure would be detrimental to the confider, in this case UK Power Networks (Operations) Limited.
35. HSE has told the Commissioner that UK Power Networks (Operations) Limited engaged the services of Edif ERA to undertake an Earthing Investigation Report in anticipation of litigation by the complainant. HSE has explained that when UK Power Networks (Operations) Limited commissioned the report and provided it to HSE, it did so on the understanding that the report would be used to support HSE's investigation and not used as part of a civil claim against them. HSE are of the view that the disclosure of the report in response to the FOIA

request would only benefit the complainant's private interests and not the interests of UK Power Networks (Operations) Limited or the public in general.

36. Having considered the above factors, the Commissioner therefore accepts that the disclosure of the information could cause detriment to the confider in this case. This is because the report, if disclosed, could be used in civil action against UK Power Networks (Operations) Limited. The disclosure of the report could also be detrimental to UK Power Networks (Operations) Limited's ability to defend itself against any legal action.

### **Is there a public interest defence for disclosure?**

37. Section 41 of the FOIA is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether HSE could successfully rely on such a public interest defence to an action for the breach of confidence in this case.
38. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to the confider. Disclosure of any confidential information undermines the principle of confidentiality, which itself depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the public interest that confidences are maintained.
39. In this case, UK Power Networks (Operations) Limited commissioned an independent investigation by Edif ERA who produced an Earthing Investigation Report on the cause of the accident. The Commissioner therefore has to take into account whether the disclosure would breach the duty of confidence to UK Power Networks (Operations) Limited as the confider of the Earthing Investigation Report to HSE, as well as Edif ERA who produced the report.
40. HSE are of the view that there is not an overriding public interest in support of the disclosure of this report into the public domain under the FOIA. HSE has advised that if the complainant requires the Earthing Investigation Report to support any civil claim then the complainant should make an application to the Court under the Civil Procedure rules, as disclosure under these circumstance means that the report can only

be used for the purposes of the civil claim and cannot be published more widely.

41. In light of the above, the evidence available to the Commissioner suggests there is not sufficient public interest in the information being disclosed. The Commissioner therefore takes the view that the public interest in preserving the principle of confidentiality is much stronger than that in disclosing the information, and that there would be no public interest defence available should HSE disclose the information.
42. The Commissioner therefore accepts that the disclosure of the information to the public would constitute an actionable breach of confidence for the purposes of section 41(1)(b) of the FOIA.
43. In conclusion, the Commissioner finds that the Earthing Investigation Report was correctly withheld under section 41 of the FOIA.



## Right of appeal

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44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

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

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

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**