Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **18 October 2019**

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

Decision (including any steps ordered)

1. The complainant has requested information regarding an explosion at a power plant. The Health and Safety Executive (HSE) disclosed some information and withheld the remainder under regulations 12(5)(b), 12(5)(e) and 13 of the EIR.

2. The Commissioner's decision is that the HSE has correctly applied the provisions of regulation 12(5)(b) to all the information in scope of the request and the public interest favours maintaining the exception and withholding the information.

Request and response

3. On 17 June 2018 the complainant made a request to the HSE in several parts in relation to a power plant in Chirk, North Wales. The request was in the following terms:

   1) "Notes, transcripts and final interview statements resulting from interviews conducted by the HSE with any Kronospan employee or sub-contractor in the context of the investigation.

   2) Details (including notes, photographs, reports) following the site investigation undertaken by the HSE which we understand to have taken place on the following dates:
   - *17 October 2016;*
   - *23 – 25 October 2016;*

- *13 – 16 December 2016; and*
- *11 – 12 January 2017.*

3) *Details (including notes, photographs, reports) of any attendance by HSE to the Plant not covered in point 2 above.*

4) *Agendas, minutes and records of meetings during the period of August 2016 to 2017 between:*
   - *Kronospan, Wärtsilä and the HSE; and*
   - *Kronospan and the HSE.*

5) *Any telephone attendance notes taken of calls during the period of August 2016 to June 2017 between:*
   - *Kronospan, Wärtsilä and the HSE; and*
   - *Kronospan and the HSE.*

6) *Correspondence between HSE and Kronospan relating to DSEAR, ATEX and HAZOP assessments.*

7) *Any correspondence relating to the prohibition notices issued to Kronospan including details of the HSE's findings on Kronospan breaches:*
   - *307450915;*
   - *307781420;*
   - *307781579; and*
   - *307781586*

8) *The root cause analysis provided by Kronospan to the HSE following the explosion (if any).*

9) *We are aware that, Kronospan was permitted to put the Plant back into commercial operation by Peter Gray (HSE employee). In order to do so, Kronospan were required to:*
   1) comply with the prohibition notices (operation of the engines was prohibited until Kronospan causation);
   2) propose and implement interim control measures to ensure safety and
   3) commit to production of a suitable and sufficient DSEAR assessment and implementation of the identified controls within a time frame agreed with HSE.

   Please provide all correspondence evidencing Kronospan's compliance with steps 1-3 above, including HSE's letter dated 24 July 2017.

10) *All HSE and HSL reports issued with respect to the incident, including HSL Report No. ES/2017/36.*

11) Our [name redacted] has previously requested information disclosed to [name redacted], and the HSE in February 2017. This information request is repeated here as a freedom of information request. We understand that Kronospan provided to you:
- A photograph of engine hall number 3 just prior to the explosion
- Certificate of test and inspection Gas engines 1 and 2 – 26/10/15
- Gas detection service agreement – Gas engine hall – 08/03/16
- Purchase order for service of gas detection equipment including certificate of test and inspection – 10/16/16
- Certificate of test and inspection – 29/06/16
- Document detailing gas detection council members
- A hard drive of the gas engine control room cctv footage"

4. The HSE responded on 16 August 2018 confirming it held inspector notebooks, photographs taken by HSE inspectors, notes of a meeting (17/06/17) and a HSE letter to Kronospan (26/07/2017). This information was disclosed.

5. For requests 1-5 where information was created or obtained by HSE during its investigation, the information was disclosed. However, witness statements were withheld under regulation 13 of the EIR.

6. For information created as part of HSE's ongoing inspection activity work relating to compliance with the prohibition notice; HSE relied on the exception at regulation 12(5)(b) to withhold information at requests 6 and 9.

7. HSE states that some of the information requested at 7 and 9 was available on HSE's website and it also disclosed the letter referred to in request 9.

8. Some information was identified as commercially confidential and therefore exempt from disclosure under regulation 12(5)(e). This information was information requested in requests 8, 10 and 11 and was information provided voluntarily by Kronospan to assist HSE's investigation. HSE also applied regulation 12(5)(b) to this information.

9. The complainant requested an internal review on 19 September 2018. This information review request was very detailed and included an excel spreadsheet of information the complainant believed would have been in the scope of the request but had not been disclosed.

10. HSE responded and confirmed that personal data had been correctly withheld and upheld the decision to apply regulation 12(5)(b) to requests 8, 10 and 11.

Background

11. In August 2016 an explosion occurred in the gas engine plant at Kronospan, a company based in North Wales. Kronospan manufacture wood-based panels using gas engines purchased from and installed by Wärtsilä (Finland). In addition to purchasing the gas engines from Wärtsilä (Finland), Kronospan also purchased a maintenance contract with Wärtsilä (UK) in order that they would undertake maintenance on the gas engines operated by Kronospan.

12. Following the incident HSE conducted a full investigation to establish if there had been a serious breach of health and safety legislation by those in control of the premises and those manufacturing and/or maintaining equipment and to ensure those in control of the premises had complied with the requirements imposed by the HSE before lifting the prohibition notice issued to Kronospan preventing them from manufacturing until the investigation was concluded.

Scope of the case

13. The complainant contacted the Commissioner to complain about the way his request for information had been handled.

14. During the course of the Commissioner's investigation it became apparent that the volume of information held by HSE on the investigation was substantial. This included witness statements, correspondence with Kronospan, Wärtsilä and other third parties, equipment test results, documentary evidence including policies, procedures and risk assessments.

15. The complainant had raised concerns that all of the exceptions had been applied on a blanket basis to withhold information and had not been properly considered in relation to the specific information held by HSE.

16. During the investigation HSE explained that the documents being withheld under regulation 12(5)(e) were those obtained from Kronospan, Wärtsilä and other contractors that were considered to be commercial or industrial in nature. These documents included information on equipment specifications for the gas engines manufactured by Wärtsilä as well as information relating to the operational activities of Kronopsan.

17. HSE had considered this information again and concluded that whilst it still maintained that this information would adversely affect the parties who provided it if it were disclosed; the regulation 12(5)(e) exception

could not be engaged as the information related to emissions. The information related to either a manufacturing process involving the use of gas or related to an incident involving the release of a gas. As such under regulation 12(9) of the EIR the HSE accepted it could not rely on this exception to withhold this information. HSE therefore considered this information could correctly be withheld as it engaged regulation 12(5)(b) as an alternative to regulation 12(5)(e).

18. The Commissioner considers the scope of her investigation to be to determine if the HSE has correctly withheld information within the scope of the request on the basis of any of the cited exceptions – regulations 12(5)(b) and 13.

Reasons for decision

Regulation 12(5)(b)

19. This regulation provides an exception to the general duty to disclose environmental information where a 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 enquiry of a criminal or disciplinary nature."

20. The successful application of this exception is dependent on a public authority being able to demonstrate that the following three conditions are met:

- the withheld information relates to one or more of the factors described in the exception;
- disclosure would have an adverse effect on one or more of the factors cited; and
- the public interest in maintaining the exception outweighs the public interest in disclosure.

21. The Commissioner's guidance on regulation 12(5)(b)[1] sets out that there is no definitive list that covers circumstances when a public authority

[1] https://ico.org.uk/media/fororganisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

may wish to consider applying the exception. The Information Tribunal[2] commented that the 'course of justice' does not refer to a specific course of action but is *"a more generic concept somewhat akin to 'the smooth running of the wheels of justice'"*.

22. The HSE has not indicated it is applying this exception due to any legal privilege and does not consider any of the information attracts legal professional or litigation privilege. The HSE argues that disclosure of the information subject to this exception would have an adverse effect on its ability to conduct investigations.

23. The HSE is the statutory body for the regulation and enforcement of workplace health, safety and welfare within the UK and it statutory powers and responsibilities are derived from the Health and Safety at Work Act 1974 (HSWA) and other associate relevant statutory provisions.

24. The HSE has pointed to sections 20-33 of the HSWA which provides HSE Inspectors with powers of entry to work places, powers to investigate incidents and powers to take enforcement action, including prosecution, against those responsible for offences under the HSWA and associated legislation.

25. One part of the HSE's statutory role is to investigate workplace incidents. In this case the primary focus of the HSE's investigation was to establish if there had been a breach of health and safety legislation by those in control of the premises (Kronospan) and/or manufacturers of equipment (Wärtsilä).

26. To establish this the HSE gathered a substantial amount of information from various parties (including Kronospan and Wärtsilä as well as other parties) such as witness statements, correspondence with the companies and third parties, equipment test results, documentary evidence including policies, procedures and risk assessments. The information was collected with a view to understanding the cause of the explosion and establishing if there were grounds for enforcement action, including prosecution against one or more parties.

27. The question for the Commissioner is whether disclosing the information to the public would adversely affect the course of justice. In this case with regard to the HSE's ability to conduct an inquiry. In considering this the Commissioner has also considered if the information can be

[2] *Rudd v IC & the Verderers of the New Forest (EA/2008/0020)*

considered on a blanket basis rather than in respect of each individual piece of information. She notes that in respect of requests 1-5 the HSE did disclose any information that was created by HSE during its investigation and it also pointed to some information available on its website. It is therefore only information obtained by the HSE in the course of its investigation that is being withheld, this information was obtained by third parties solely for the purpose of the investigation and therefore the Commissioner is of the view it can all be considered as a whole under this exception.

28. The Commissioner's guidance on regulation 12(5)(b) states that the principle of an adverse effect on the course of justice is wide enough to cover any adverse effect on investigations and proceedings.

29. The Commissioner would accept that the HSE has a duty to conduct investigations and proceedings under the HSW so she must consider if the information requested would adversely affect the HSE's ability to conduct investigations if it were disclosed.

30. The HSE has clarified its investigation is closed and was at the time of the request. It is therefore arguing that disclosure would adversely affect future investigations as those under investigation and third parties assisting in an investigation would be deterred from disclosing information voluntarily. The HSE acknowledges it has powers under the HSWA to compel those under investigation to share information but as a regulator, the HSE prefers to obtain information on a voluntary basis rather than using its formal powers.

31. The HSE considers disclosing the information obtained as part of its regulatory functions would undermine the voluntary disclosure process and this would ultimately have an adverse effect on it future regulatory functions. This is because those under investigation would be unwilling to share information and this could delay or hinder enforcement action, including prosecution, and those responsible for health and safety breaches may not be held to account for their actions in a timely manner, or at all.

32. In reaching a decision on this, the Commissioner has sampled the withheld information in each of the categories to form a view as to whether the HSE's arguments are valid.

33. Firstly, the Commissioner has viewed information which includes information provided by third parties on the building safety and air quality following the explosion. There is also information withheld which was provided by Wärtsilä on the building safety including risk assessments. It can be argued that disclosing information of this nature would be detrimental as if those providing views on these issues are

conscious of the prospect of disclosure then the nature of the process for openly debating risks in a candid way would be compromised. The efficiency of the deliberation process and the discussions on risk and safety may suffer if the frankness of these communications was reduced.

34. On a more general point, the evidence collected by the HSE is an indicator of what is required for the HSE to make decisions. It is essential that HSE, as a regulator, has a safe space to make assessments without revealing the methodology used to make decisions. If it is known the level of evidence and depth of investigation routinely required by the HSE then it is possible that this could be used to allow others to evade enforcement action by withholding information or tailoring evidence it is known the HSE is likely to require.

35. In terms of other correspondence, documents, photographs and reports obtained through correspondence, the information was provided to the 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.

36. Although HSE can obtain information from various parties 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 parties would be less willing to share information with the HSE on a voluntary basis and this in turn would impact its regulatory functions.

37. Regarding the witness statements provided; this information was volunteered with an understanding of confidentiality. Information within the witness statements were integral to understanding what happened. Release into the public domain would affect the voluntary supply of information from witnesses in the future and adversely affect the HSE's ability to carry out its regulatory functions.

38. The Commissioner has issued previous decision notices relating to the use of the regulation 12(5)(b) exception and has previously commented that *"disclosure could hinder the authority's ability to find witnesses willing to participate in investigation, once they knew that their contributions could be disclosed. This could adversely affect the authority's ability to conduct investigations. (S)he also accepted that release of this information could reveal how the authority conducted investigations – awareness of its techniques could enable suspects to evade convictions."*

39. Whilst the Commissioner appreciates that the investigation is now complete, she considers that there is merit in the argument that disclosure of the information would have an adverse effect upon the relationship between the HSE and the third parties, including witnesses, as well as other organisations in the manufacturing sector 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 third parties and the HSE would therefore prejudice the HSE's investigatory powers.

40. 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 the withheld information. The Commissioner has therefore gone on to consider the public interest test in this case.

Public interest arguments in favour of disclosure

41. The HSE acknowledges there is a strong public interest in information relating to its investigations being disclosed into the public domain as it will provide the details of a particular incident and how HSE dealt with that incident.

42. The complainant considers that as the investigation has concluded disclosure is important for transparency and accountability and there is a strong public interest in disclosure of the findings of that investigation.

43. The complainant further argues that while there may be other ongoing regulatory activity ongoing, if the investigation is completed and reports finalised these will not change as a result of the further ongoing regulatory activity. The complainant considers if the information withheld is factual information about the event itself and the immediate actions taken following the event then it is hard to see how it is in the public interest to continue to withhold the information once the investigation is completed.

44. The complainant is of the view there is a strong public interest in disclosure to further the public understanding of what HSE's findings were and what steps the HSE indicated should be taken to prevent similar events from happening again. As the site had been cleared to recommence activities, those working in the site should be able to know what the cause of the incident was and what to look out for to protect themselves.

45. Additionally, the complainant argued as remediation action and follow-up regulatory actions between HSE and Kronospan could take time, it

would not be appropriate to withhold information about a completed investigation simply because there might be follow-up actions. It was argued that as the investigatory portion of the HSE's work had been completed there was more weight to be given to the need for transparency of the findings and information considered in relation to those findings.

Public interest arguments in favour of maintaining the exception

46. HSE argues that it relies on cooperation from various parties in order to carry out its regulatory activities. This can include the voluntary provision of information to assist with investigations and it can reasonably be expected by the provider of this information that this is used to inform the investigation and will not be more widely disclosed.

47. In this case, disclosure might inhibit ongoing and future cooperation at this site and other sites within the sector.

48. Although the investigation part of the HSE's regulatory activities was complete and there was no ongoing enforcement activities at the time of the request, the HSE states it was still involved with inspection activities at Kronospan arising from the prohibition notices that were served and since complied with.

49. The HSE argues that disclosure of information provided voluntarily by the operator to third parties would adversely affect the ongoing activities of the HSE which are aimed at securing further safety improvements and this would not be in he public interest.

50. The HSE also states that it investigates thousands of work place concerns and incidents every year and are unable to proactively publish the findings of them all. However, it does routinely publish via its Press Office Briefings outcomes of investigations that it believes are in the public interest and it publishes statistics via its website relating to major and fatal incidents. The HSE also routinely partially discloses investigation reports in response to FOI requests that are deemed to be in the public interest.

51. In response to this request, received from Wärtsilä, the HSE partially disclosed its investigation report, 12 inspector notebooks covering the period August 2016 to March 2018, meeting notes and 43 photographs. The HSE is of the view that this disclosure fully satisfied any public interest as it provided the public with a factual account of the incident investigated by the HSE and it details the HSE's interventions following the incident.

Balance of the public interest test

52. The Commissioner accepts that in general there is a clear interest in public authorities being accountable in relation to their responsibilities, particularly when these relate to health and safety and where the information would shed some light on the actions taken by the HSE in dealing with the incident.

53. The HSE has argued there would be a chilling effect on information provided in future investigations. Chilling effect arguments carry less weight when the information being considered for disclosure is purely factual in nature. However, where the information consists of opinions or discussions it can be argued that disclosure would lead to a more guarded approach and less frank sharing of information in future cases. Where the information is factual it is more difficult to argue there would be any chilling effect as the information that is provided would be the same whether it is provided voluntarily or under obligation.

54. In this case, much of the factual information has been disclosed, certainly enough for the public to understand the facts of the incident and the follow-up action taken by the HSE. A significant amount of the withheld information is made up of witness statements, discussions and risk assessments/reports which do contain some factual information but also discussions and views from various parties. The Commissioner considers there is therefore some merit to the chilling effect arguments presented by the HSE.

55. The Commissioner must also consider the timing of the request and the fact that the investigation had concluded. Despite this it is noted that there were still ongoing inspections and follow-up work continuing and disclosure may have led to greater external scrutiny and there is therefore legitimacy to the argument that any further recommendations or inspections may be tainted by outside influences. This would have an adverse effect on the course of justice and this would not be in the public interest.

56. Disclosure of information voluntarily provided by third parties, when they might reasonably expect that information not to be disclosed adversely affect HSE's ability to conduct an enquiry and could prejudice enforcement of the law. It is in the public interest that HSE protects its ability to be an effective safety regulator. This is a very strong exception and in the Commissioner's opinion, overrides the presumption in favour of disclosure. Therefore, the Commissioner finds that the information covered by this exception should not be disclosed. The Commissioner has not gone on to separately consider regulation 13 as this information is also excepted from disclosure under regulation 12(5)(b).

Right of appeal

57. 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@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

58. 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.

59. 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 .....

Jill Hulley
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