

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 September 2022

Public Authority: Health and Safety Executive

Address: Redgrave Court
Merton Road
Bootle
Merseyside
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested all information held by HSE relating to an investigation that the Health and Safety Executive carried out into the death of a particular individual.
2. The Health and Safety Executive withheld the requested information, citing section 30(1)(b) (investigations and proceedings) of FOIA.
3. The Commissioner's decision is that the exemption is engaged and the public interest lies in maintaining the exemption.
4. The Commissioner does not require any further steps to be taken.

Request and response

5. On 6 April 2021, the complainant wrote to the Health and Safety Executive (HSE) and requested information in the following terms:

'Under a freedom of information request we seek all documentation held by you in relation to the death of [named individual] as we act for his parents. [named individual] died on 25th October 2019. I understand there are photographs and videos held by yourselves taken by HSE expert [name redacted] to which we have not had access and require all such documents namely all documents held by HSE regarding the death of [named individual].'

6. The HSE responded on 5 July 2021 and refused to provide the requested information under section 30(1)(b) FOIA.

7. The complainant requested an internal review on 11 October 2021 (despite the fact that HSE did not provide details of its internal review procedure within its refusal notice in accordance with its obligations under section 17(7) FOIA). On 8 March 2022 the Commissioner wrote to HSE asking it to carry out the internal review as it had failed to complete one.
8. HSE failed to carry out an internal review in this case. The Commissioner therefore accepted the case as eligible for investigation without an internal review.

Scope of the case

9. The complainant contacted the Commissioner on 15 February 2022 to complain about the way that their request for information had been handled.
10. The Commissioner considers the scope of his investigation to be to determine whether the HSE is entitled to withhold the requested information under section 30(1)(b).

Reasons for decision

Section 30 – investigations and proceedings

11. Section 30(1) of the FOIA states that:

‘Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(b) 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 power to conduct.’
12. The Commissioner considers that the phrase ‘at any time’ means that information can be exempt under section 30(1)(b) if it relates to a specific ongoing, abandoned or even closed investigation.
13. In this case the Commissioner has not asked the HSE to provide him with a copy of the withheld information. The Commissioner understands that the withheld information will include all documentation relating to an investigation carried out by the HSE into the death of the named individual which may include photographs and videos as described by the complainant.

14. Section 30(1)(b) is a class-based exemption. There is no requirement to demonstrate that disclosure of this information might be harmful in order for section 30(1)(b) to be engaged.
15. Section 30(1)(b) is also a qualified exemption. This means that, even if the exemption is engaged, consideration must be given as to whether the public interest lies in disclosure or in maintaining the exemption.

Is the exemption engaged?

16. The first step is to determine whether the withheld information falls within the class described in section 30(1)(b).
17. The Commissioner's guidance 'Investigations and Proceedings'¹ clarifies that section 30(1)(b) '... applies to investigations but the public authority only needs to have the **power** to conduct those investigations rather than a duty. Importantly, the public authority must also have the power to institute and conduct any criminal proceedings that result from its investigation.'
18. The HSE has previously explained to the Commissioner that 'HSE is a statutory body created by the Health and Safety at Work etc Act 1974² (HSWA) and one part of its statutory role is to investigate workplace incidents (and potentially dangerous workplace situations) and bring those who breach health and safety legislation to account.'
19. The Commissioner understands that the particular powers that the HSE has are outlined in section 20³ of the HSWA. The Commissioner particularly notes section 20(2)(j) which states that an inspector can 'require any person whom he has reasonable cause to believe to be able to give any information relevant to any examination or investigation...and to answer any such questions that the inspector thinks fit to ask.'
20. The Commissioner notes that the HSE also has powers to prosecute individuals for breaching the HSWA, as outlined in section 39 of the HSWA.⁴

¹ [investigations-and-proceedings-foi-section-30.pdf \(ico.org.uk\)](https://ico.org.uk/investigations-and-proceedings-foi-section-30.pdf)

² [Health and Safety at Work etc. Act 1974 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/1974/75)

³ [Health and Safety at Work etc. Act 1974 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/1974/75)

⁴ [Health and Safety at Work etc. Act 1974 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/1974/75)

21. Section 30(1)(b) can only be utilised by public authorities that have a duty to investigate, however that investigation may occur, whether an individual should be charged with an offence. The public authority must also be able to prosecute any individual should such an investigation require it to do so.
22. Taking into account the nature of the HSE's work, its powers under the HSWA and the nature of the information requested in this case relating to an investigation into the death of a particular individual, the Commissioner is satisfied that the withheld information falls within the class described in section 30(1)(b). Therefore, the exemption is engaged.
23. To reiterate, section 30(1)(b) is a qualified exemption. Therefore, the Commissioner must determine whether the public interest lies in disclosure or in maintaining the exemption.

Public interest test

Public interest arguments in favour of disclosing the information

24. The HSE acknowledges that disclosure would promote transparency, accountability and build confidence in its investigative and enforcement powers.
25. The HSE has also acknowledged that disclosure ensures the health and safety of employees and others.
26. The complainant considers that disclosure would allow the problems with potential faulty machinery as noted in this particular case to be fully in the public domain.

Public interest arguments in maintaining the exemption

27. The HSE is concerned that disclosure would discourage third parties to engage with the HSE on a voluntary basis which would compromise the HSE's ability to perform its regulatory functions.
28. HSE considers that where a decision is taken not to proceed to prosecution this adds weight to the public interest arguments in maintaining the exemption.

The balance of the public interest arguments

29. The Commissioner accepts that there is a public interest in understanding how the HSE carries out its investigative work and how it makes decisions as to whether an individual should be prosecuted or not.

30. However key to the consideration of any section 30 case is to determine whether disclosure could in some way compromise a public authority's ability to carry out its investigative work effectively. Clearly, it is not in the public interest to jeopardise the ability of the HSE to regulate and enforce compliance with the HSWA.
31. The Commissioner accepts that organisations with functions to investigate and prosecute criminal offences rely on the voluntary co-operation of victims and witnesses – as well as those under investigation. Whilst those bodies usually have enforcement powers to require information to be provided, these are most effective when used sparingly and it is important not to obstruct the voluntary flow of information.
32. In this case, where there has been a decision not to prosecute, disclosure may imply wrongdoing where no such finding has been made. This is in accordance with previous decisions reached by the Commissioner such as in IC-93294-H1J1⁵.
33. The Commissioner acknowledges and is sympathetic to the complainant's concerns. However, it is not the Commissioner's role to comment on the effectiveness or reasoning behind a HSE decision. If the complainant is dissatisfied with a decision taken by HSE, they can escalate a complaint through the HSE and then onto the Parliamentary and Health Service Ombudsman.
34. Having considered the circumstances of the case, the Commissioner has determined that the public interest lies in maintaining the exemption.

Section 10

35. Section 1(1) 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."

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4019440/ic-93294-h1j1.pdf>

36. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
37. In this case the request was made on 6 April 2021 and a response was not provided until 5 July 2021. The Commissioner finds that HSE has breached section 10(1) by failing to respond to the request within 20 working days.

Section 17

38. Under section 17(7) HSE is obliged to include details of its internal review procedure within its refusal notice. In this case HSE failed to do so and therefore did not comply with section 17(7) FOIA.

Other matters

39. Whilst there is no statutory time limit for carrying out an internal review, the Commissioner considers that they should usually be completed within 20 working days and should never take longer than 40 working days. In this case, the Commissioner notes that the HSE had not completed an internal review, despite his intervention, on 8 March 2022 (five months after the review was requested). He considers this to be extremely poor practice.
40. In this case HSE did provide details of an alternative route to obtain the requested information outside of FOIA either under the Administration of Justice (Scotland) Act 2002 or the common law Specifications of Documents procedure. HSE provided the complainant with a Specifications of Documents template which it confirmed it was unlikely to oppose disclosure of (as opposed to disclosure under FOIA which is disclosure into the public domain). The complainant may therefore wish to consider making such an application.

Right of appeal

41. 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

42. 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.
43. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF