

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 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 copies of correspondence exchanged with three individuals and their legal representatives. The HSE relied on section 30 of the FOIA (criminal investigations) in order to withhold the information.
2. The Commissioner's decision is that the withheld information engages section 30 of the FOIA and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On a date prior to 21 January 2021, the complainant requested information of the following description:

"All correspondence from either [redacted], [redacted], [redacted] or [redacted] relating to the Health and Safety Executive investigation concerning the property [redacted]."

"Please include copies of any correspondence sent by the Health and Safety Executive to either [redacted], [redacted], [redacted] or [redacted] in relation to the same investigation. Please include any items sent by post or via email."

"The timeframe that I am interested in is 1/12/2018 to 1/12/2019."

5. On 21 January 2021, the HSE responded. It refused to provide the requested information. It relied upon section 30(1)(b) of the FOIA to withhold the information as it had held the information for the purposes of a criminal investigation.
6. The complainant requested an internal review on the same day. The HSE had not completed an internal review at the point the Commissioner accepted the case for investigation or at the date of this notice.

Scope of the case

7. The complainant contacted the Commissioner on 10 March 2021 to complain about the way his request for information had been handled. At that point, the HSE had yet to complete its internal review.
8. Despite an informal intervention from the Commissioner, the HSE failed to complete its internal review within a reasonable period, so the Commissioner exercised his discretion and accepted the case without waiting for the HSE to complete its review.
9. The Commissioner began his investigation on 17 August 2021 with letters to both parties. Given that the complainant had made two other complaints relating to the same HSE investigation, the Commissioner considered that it would be more practical to deal with all three cases simultaneously. The HSE did not object to this approach.
10. When submissions failed to materialise by the deadline, the Commissioner sent chasing correspondence on 20 September and 30 September. The HSE issued a brief holding response on 1 October and a further response on 7 October. It stated that it intended to provide a submission in respect of one of the complaints by 15 October, but did not mention any of the other complaints – despite being asked to do so.
11. On 21 October, having failed to receive any submissions or any indication of when submissions might be forthcoming, the Commissioner issued three information notices obliging the HSE to provide him with the information he required to reach his decision. The HSE had until 20 November to supply the information. It once again failed to do so and it was only when the Commissioner threatened to bring contempt proceedings that it finally provided its submission on 30 November followed by the withheld information two days later. No apology or explanation for the delay was offered.

12. The Commissioner has made further comment on the HSE's engagement under the "other matters" section of this notice.
13. Finally, the Commissioner notes that part of the withheld information is clearly the complainant's own personal data. Given that the HSE has applied section 30 to *all* the withheld information whereas only *some* of the information would be the complainant's personal data, the Commissioner has not made any formal finding, but has made comments under the "other matters" section of this notice.
14. The Commissioner considers that the scope of his investigation is to determine whether the HSE has correctly applied section 30 of the FOIA to the withheld information.

Reasons for decision

15. 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—

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

(i) whether a person should be charged with an offence

16. Section 30 of the FOIA is a class-based exemption – meaning that all documents of a particular type will be covered by the exemption. There is no requirement to demonstrate that disclosure might be harmful.
17. The withheld information in this case comprises of a significant volume of email chains exchanged between three individuals, their legal representative and HSE investigators.
18. HSE argued (and the Commissioner is already aware from the other complaints) that, at the time this information was created, the HSE was trying to establish whether an unregistered engineer had carried out gas work, at the property specified in the request, without the supervision of a registered gas engineer and, if so, whether either of the individuals had committed an offence under the Health and Safety at Work Act 1974 and the Gas Safety (Installation and Use) Regulations 1998.
19. To engage this exemption, it is not sufficient for a public authority to merely carry out an investigation. The investigation must be carried out with a view to "ascertaining" whether a person should be charged with an offence. The Commissioner considers that the word "ascertaining"

means more than just providing an opinion or recommendation. It implies that the public authority should have the power to begin a prosecution against that individual, should the circumstances warrant it.

20. The Commissioner is satisfied that the HSE has appropriate powers to investigate and prosecute people for breaching the Health and Safety at Work Act and for breaching regulations arising out of that Act. It therefore does not just carry out investigative work, it also has the necessary powers to "ascertain" whether an individual should be charged with an offence. The information in question, which contains the allegations made and the responses to those allegations, was clearly held for the purposes of carrying out that investigation and might have been used in evidence, had the case gone to court.
21. The Commissioner is therefore satisfied that the HSE held this information for the purposes of an investigation to ascertain whether two individuals should be prosecuted for criminal offences. It follows that section 30 of the FOIA is engaged.

Public interest test

22. Section 30 is a qualified exemption – meaning that even if information is held for the purposes of an investigation, it must still be disclosed unless the balance of the public interest favours maintaining the exemption.
23. Given the relatively broad nature of the exemption and the fact that it is class-based, there will always be an inherent public interest in maintaining the exemption. The strength of that interest will depend on the withheld information and the circumstances that prevailed at the time of the request.
24. When asked to list the public interest factors it had considered in favour of disclosure, the HSE responded to say:

"Transparency and accountability"
25. The Commissioner would note 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.
26. In this case, the HSE had completed its investigation and decided not to prosecute either of the individuals in question. There is thus arguably a slightly stronger public interest than usual in understanding why and how the HSE reached that decision.
27. In explaining why the balance of the public interest should favour maintaining the exemption, the HSE argued that:

"HSE are of the view disclosure of the information requested by [the complainant] into the public domain would not meet the overall public interest test and would only meet the private interest of [the complainant]. As a regulatory body it is vital HSE be able to conduct investigations thoroughly, effectively and free from the public gaze. Although HSE has concluded its investigation of this incident, we are of the view disclosure of the information requested by [the complainant] into the public domain would have an adverse impact on our ability to conduct investigations generally because disclosure would be likely to:

- Impede the gathering of information and evidence going forward. Although HSE has powers under the HSWA to obtain information from those under investigation, we prefer to obtain information voluntarily as this generally provides HSE with a greater range of information that makes our ability to investigate incidents easier. When we have to compel those under investigation to provide information, we can often not rely on that information in a court of law. Much of the communications received from HSE by the involved parties was provided voluntarily.*
- Inhibit HSE's ability to conduct further investigation effectively because third parties may be less willing to volunteer information to HSE if information is disclosed inappropriately;*
- Be detrimental to those under investigation."*

The Commissioner's view

28. The Commissioner's view is that the balance of the public interest favours maintaining the exemption.
29. 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.
30. Whilst it is not clear why the HSE would need to engage further with the individuals in question given that the investigation is now closed, the Commissioner recognises that others will find themselves in a similar position in future and should not be dissuaded from cooperating.
31. Disclosure of the withheld information would risk creating a false impression as to what the individuals had done and might imply that

they were guilty of wrongdoing – despite no such finding having been made.

32. Furthermore, the Commissioner notes that the original wording of the request named the complainant's home address. That might enable the complainant's neighbours to identify some of the people involved in the investigation and link those people to the evidence they provided.
33. Finally, the Commissioner considers that, even if section 30 did not apply, the amount of redaction that would be necessary to remove any personal data (and particularly criminal offence personal data) would render the remaining information so incomplete as to be potentially misleading.
34. This particular incident was not a large-scale incident. The Commissioner considers that whilst the complainant clearly has a strong private interest in the matter, it serves no broader public interest. Conversely there is a very strong public interest in allowing the HSE to gather the information it needs to enforce health and safety legislation.
35. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption.

Other matters

36. The Commissioner recognises that almost all public authorities have experienced increased difficulties in meeting their statutory obligations to provide information during the Covid-19 pandemic. HSE in particular informed the Commissioner during the summer that it was struggling both in terms of increased volumes and reduced capacity.
37. As a reasonable and proportionate regulator, the Commissioner is always willing to work with any public authority to minimise the burden of dealing with requests and complaints to his office. He is usually willing to extend deadlines – particularly when the public authority is able to offer a reasonable timetable for providing its response.
38. However that pragmatic approach is contingent on him receiving meaningful engagement with the public authority in question.
39. In this case, the Commissioner notes that it took almost four months to get the HSE to provide its submission. His own deadlines were ignored, the HSE was not willing to suggest any timetable for providing its responses and, the one time that it did set itself a deadline, it failed to

meet it. Only when threatened with the prospect of being found in contempt did the HSE finally provide its response.

40. The Commissioner considers the HSE's engagement with his office on this case to have been unacceptably poor and he expects to see improvements when future complaints are allocated for investigation.

Timeliness

41. 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.
42. In this case, the Commissioner notes that the HSE had not completed its internal review, despite his earlier intervention, some ten months after the review was first requested. He considers this to be extremely poor practice.
43. As no definitive evidence has been produced which demonstrates the date on which the request was made, the Commissioner has not been able to determine whether the HSE's procedural handling of this request amounted to a statutory breach. However, the Commissioner notes that this request was responded to on the same day as the HSE responded to another request, made by the same individual, relating to the same matter, in October 2020. He also notes that he has dealt with a number of complaints about delayed responses from the HSE.
44. The Commissioner considers it unlikely that the HSE would have issued its refusal notice within 20 working days. However, without proof of when the request was made, he cannot find a breach of section 17 of the FOIA.

Section 40(1) – third party personal data

45. In his initial investigation letter, noting the connection between the request and the complainant's home, the Commissioner asked the HSE whether it had considered whether any of the information was the complainant's own personal data.
46. HSE responded to say that:

"HSE's primary function during an investigation is to gather information from involved parties and use that information to establish if there has been a breach of health and safety legislation and to take enforcement action if necessary."

"In this case, HSE were primarily investigating the engineer who worked at the property owned by [the complainant] however as part of that investigation we also consulted other individuals who also worked at the property. HSE do not consider any of our communications with [redacted], [redacted], [redacted] or Mr [redacted] to be the personal data of [the complainant] just because these individuals were involved with installing a boiler at his property. HSE deem the only information we hold that would be considered [the complainant]'s personal data to be the witness statements he provided to HSE as part of our investigation.

47. The Commissioner accepts that the primary focus of the withheld information was the HSE's investigation into potential criminal offences committed by two people. However, this does not prevent the same information from containing the complainant's own personal data.
48. The complainant is mentioned numerous times within the withheld information. References are made to actions the complainant took, or is alleged to have taken. The alleged offences centred around work done at the complainant's home. Whilst not all the withheld information will be the complainant's own personal data, some of it will be.
49. Whilst he has no power to do so as part of a FOIA decision notice, the Commissioner would strongly advise the HSE to re-consider the request in accordance with its Subject Access Request obligations.

Right of appeal

50. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

51. 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.
52. 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

Roger Cawthorne
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