

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 4 February 2010

Public Authority: The Health and Safety Executive
Address: 4SG Redgrave Court
Merton Road
Bootle
Merseyside L20 7HS

Summary

The complainant made a request for documentation relating to complaints made to the Health and Safety Executive against his limited company. The Health and Safety Executive refused to disclose the information, relying upon the section 30 exemption under the Freedom of Information Act 2000 (the 'Act'). The Commissioner considered the request should have been dealt with under the Environmental Information Regulations 2004. The Health and Safety Executive reconsidered the information and withheld it under the regulation 12(5)(b) exception. It is the Commissioner's view that the Health and Safety Executive applied the exception appropriately.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

2. The complainant is managing director of a limited company which produces fertilisers. The public authority received complaints about episodes of vomiting, alleged to have been caused by dust and/or fumes emitted from the limited company's premises. The public authority launched an investigation into these

complaints and at the time of this Decision Notice, the public authority has confirmed that the investigation is still on-going.

The Request

3. On 16 June 2008 the complainant made the following request: *'All documents relating to the complaint against [named company]'*.
4. On 27 June 2008 the Health and Safety Executive (HSE) responded declining to disclose the information under section 30(1)(b) of the Freedom of Information Act 2000.
5. On 3 July 2008 the complainant requested an internal review.
6. On 30 July 2008 the HSE confirmed that it had carried out an internal review, withholding the information on the same ground.

The Investigation

Scope of the case

7. On 7 November 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. During his investigation the Commissioner asked the public authority for clarification about the information it held in relation to the investigation it was carrying out. The public authority provided a schedule of information. However the Commissioner noted that several pieces of information were already in the complainant's possession, given that they were correspondence between him and the public authority and also various internet printouts, therefore the Commissioner will not be considering these any further. He has clarified with the HSE the specific information which remains within the scope of his investigation.

Chronology

9. On 29 July 2009 the Commissioner explained to the HSE that it was his view that the request for information should have been considered under the EIR. The HSE responded explaining that it was now relying on the EIR to withhold the information under the regulation 12(5)(b) exception.
10. On 29 October 2009 the Commissioner requested a schedule of the withheld information and asked for the status of the investigation. The public authority provided the schedule and confirmed that the investigation was ongoing.

11. On 3 November 2009 the Commissioner contacted the public authority to verify what specific information it was withholding. He noted that the complainant already had some information and some of it was already in the public domain.
12. On 24 November 2009 the Commissioner contacted the public authority as there was still some information that needed clarification.
13. On 16 December 2009 the public authority confirmed the information that it was withholding and confirmed that the investigation was still on-going.

Analysis

Substantive Procedural Matters

Environmental Information

14. Initially the public authority withheld the requested information under section 30 of the Act. However it is the Commissioner's view that this request for information should have been considered under the EIR.
15. Regulation 2(1) of the EIR requires that information may be written, visual, aural, electronic or any other material form. In this particular case the information is held in written and photographic form.
16. Regulation 2(1)(a) provides that information on the state of the elements of the environment such as air and atmosphere will be environmental information.
17. Regulation 2(1)(b) provides that information on factors, such as emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a) will be environmental information.
18. The Commissioner does not consider it to be necessary for information itself to have a direct effect on the environment for it to be environmental. He considers that the phrase "... any information ... on " should be interpreted widely and in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.¹
19. The Commissioner is satisfied that the withheld information falls within the definition of environmental information for the purposes of the EIR. The investigation in question concerns emissions which are a factor as defined in regulation 2(1)(b) that are likely to affect the state of the elements referred to in 2(1)(a).

¹ Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment

Exceptions

Regulation 12(5)(b)

20. Regulation 12(5) provides: *'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-*

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature'.

21. However it is subject to the public interest consideration as set out in regulation 12(1)(b): *'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'.*

22. The Commissioner takes the view that there is a strong public interest in disclosing environmental information. This view is supported by regulation 12(2) which states:

'A public authority shall apply a presumption in favour of disclosure'.

23. In deciding whether this exception has been applied correctly, the Commissioner had to consider whether the withheld information related to an inquiry conducted by the public authority of a criminal or disciplinary nature. The Commissioner is satisfied that this is the case.

24. Regulation 12(5)(b) will also only be engaged if disclosure of the information would have an adverse affect on any of the factors listed in the exception. Arguments that disclosure 'might' or 'could' have an adverse affect will not be sufficient.

25. The HSE has argued that disclosure of this information would have an adverse effect as its investigation is still on-going. The information withheld includes information regarding the complaints made about the complainant's limited company (including the public authority's investigation) and witness statements. Disclosure would have an adverse effect on the ability of the HSE to obtain the full and frank statements of witnesses, the collecting of evidence and the quality of evidence. Were full and frank opinions or statements not provided due to a fear that these would be disclosed at a future date this would adversely affect the investigatory process. Furthermore the possibility of the disclosure of witness statements would discourage people from coming forward as witnesses. This would have an adverse effect on the ability of the public authority to conduct an inquiry.

26. The Commissioner is satisfied that the investigation was ongoing as at the date of the request and that the disclosure of the withheld information whilst the investigation by the public authority was ongoing would have had an adverse affect on its ability to conduct an investigation. He therefore finds that the exception is engaged.

Public interest arguments in favour of disclosing the requested information

27. The complainant argued that it is his right to be given the withheld information as it relates to the investigation of his limited company. However the Commissioner considers that, under the EIR, the private interests that might be served by a limited disclosure of information to a particular individual are not relevant. Rather it is the public interest in releasing information into the public domain that must be taken into account. He has not therefore accepted this as a public interest argument in favour of disclosure.
28. The public authority acknowledged that disclosure of the information could promote transparency and accountability. It could also build confidence in its investigative and enforcement activities. It also acknowledged that disclosure could ensure that it was utilising its resources properly and allow individuals and companies to understand the HSE's decision-making process.

Public interest arguments in favour of maintaining the exception

29. The public authority explained that it felt that it was in the public interest to maintain the exception. It argued that disclosure would be prejudicial to its ability to communicate fully, frankly and in confidence with individuals. In turn this would inhibit its ability to conduct future investigations thoroughly and effectively because third parties would be less willing to volunteer information.
30. The public authority went on to argue that disclosure could endanger the confidentiality of information provided by individuals and organisations. The Commissioner accepts that this would also inhibit the public authority's ability to conduct future investigations, for the same reasons as given in the paragraph above.
31. The public authority acknowledged that there is a presumption on disclosure under regulation 12(2), but maintained that in all the circumstances of this case, the public interest in maintaining the exception outweighed the public interest in disclosure.
32. It referred to a Decision Notice of the Commissioner's (FS5008944 paragraphs 17 and 18) which dealt with the application of section 30 of the Act. The public authority explained that although the information was now being considered under the EIR, this reasoning also applied to this particular case. It quoted from that Decision Notice:

' ... there needs to be balanced the potential impact of disclosure on the success of the public authority's investigation; and the prejudicial effect that disclosure will have on the ability of the public authority to effectively perform its regulatory functions.

The Commissioner has considered the competing public interest arguments, in favour of maintaining the exemption and in favour of disclosure, in the context of the information held in the analysis section HSE's report into this case. It should be made clear at this stage that the Commissioner's concern

is not with the private interest of individuals, however understandable that interest might be or however sympathetic he may feel towards it. As the Information Tribunal recognised in its decision in the case of Hogan v Oxford City Council (Tribunal reference: EA2005/0026 and EA2005/0030, paragraph 61): 'the public interest test is only concerned with public interests, not private interest (my emphasis). While the analysis (which would not, in any event, add materially to the complainant's knowledge of the accident) will clearly be of interest to the complainant, this does not necessarily mean that there is a wider public interest that would be served by its release. It is important for public confidence in the activities of HSE that accidents should be thoroughly investigated by it, and that its ability to discharge its statutory functions should be effective and unimpeded.'

33. The public authority also pointed to another Decision Notice (FS50121354 paragraph 21) about the application of section 30 in which the Commissioner's own guidance was quoted: *'For this exemption, it will involve weighing the harm that may be caused to an investigation against the wider public interest in disclosure. The public interest in disclosure of information is likely to be weaker while an investigation is being carried out.'*

Balance of the public interest arguments

34. The Commissioner notes that the public authority has confirmed that it is still carrying out its investigation into complaints about the complainant's limited company. He therefore accepts that the investigation was still ongoing as at the date of the request in this case, and that this fact means that very considerable weight should be given to the public interest in maintaining the exception.
35. The withheld information includes information regarding the complaints made about the complainant's limited company. It also includes witness statements and exchanges between the public authority and solicitors of people who made the original complaints. The Commissioner accepts that the public authority needs to be able to carry out investigations (including corresponding with solicitors if necessary), into complaints it receives.
36. He also accepts the public authority's arguments that if information of this nature was disclosed whilst the inquiry was still on-going, it could impact on its ability to communicate fully, frankly and in confidence with stakeholders, individuals and organisations. This is because as the public authority argued, it would inhibit its ability to conduct future investigations thoroughly and effectively because third parties would be less willing to volunteer information.
37. The Commissioner considers that the considerable weight in maintaining the exception is sufficient to outweigh the public interest in disclosure as set out at paragraph 28 above.

Procedural Requirements

38. Initially the public authority dealt with the request for information under the Freedom of Information Act 2000. However it is the Commissioner's view that the request should have been dealt with under the EIR. Therefore the Commissioner

finds that the public authority has breached regulation 14(1) of the EIR as it did not provide a refusal notice compliant with the requirements of regulation 14(3).

The Decision

39. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- The application of regulation 12(5)(b)

40. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- Regulation 14(1) – in that initially the public authority dealt with the request for information under the wrong regime and therefore failed to provide a refusal notice compliant with the requirements of regulations 14(3).

Other Matters

41. The Commissioner notes that under section 7(1) of the Data Protection Act 1997 (DPA) the complainant has information access rights in relation to any personal data held by the public authority of which he is the data subject. The Commissioner considers that the public authority should now go on to consider its obligations to the complainant under the DPA, in relation to this request.

Right of Appeal

42. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 4th day of February 2010

Signed

**Lisa Adshead
Senior FOI Policy Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Environmental Information Regulations 2004

Regulation 2 states that:

(1) In these Regulations -

... "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Regulation 12 states that:

- (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -
- (a) an exception to disclosure applies under paragraphs (4) or (5); and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -
- (a) it does not hold that information when an applicant's request is received;
 - (b) the request for information is manifestly unreasonable;
 - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves the disclosure of internal communications.
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -
- (a) international relations, defence, national security or public safety;
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person -
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
 - (g) the protection of the environment to which the information relates.

Regulation 14 states that:

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
- (3) The refusal shall specify the reasons not to disclose the information requested, including -
- (a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

(5) The refusal shall inform the applicant -

(a) that he may make representations to the public authority under regulation 11; and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18.

Annex 2

Documents to be withheld - identified by numbers provided by the public authority as per its schedule of 3 November 2009.

Document Number:

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