

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2012

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

Decision (including any steps ordered)

The complainant has requested full unedited sets of minutes of meetings held over a 12 month period (March 2010-March 2011) of the HSE's Senior Management Team. The Commissioner's decision is that the HSE has correctly applied the exemptions set out in sections 35 and 36 of FOIA to the withheld information. The Commissioner requires no steps to be taken.

Request and response

1. On 9 April 2011, the complainant wrote to the HSE and requested information in the following terms:

" Under the FOI Act I would like to request the full, unedited sets of minutes for the previous 12 months Senior Management Team Meetings.

The HSE responded on 12 May 2011. It stated that it required more time to consider the public interest as an exemption under FOIA applied to the requested information.

2. The HSE provided a final response to the complainant on 26 May 2011. It disclosed some of the requested information, however it withheld the remainder ("the withheld information") citing the exemptions under sections 35, 36 and 40 of FOIA as a basis for non-disclosure.

3. Following an internal review the HSE wrote to the complainant on 11 October 2011. It stated that it now believed some of the withheld information could be disclosed to the complainant but that the above sections of FOIA still applied to the remaining withheld information.

Scope of the case

4. The complainant contacted the Commissioner to complain about the way his request for information had been handled, in particular the HSE's delayed response to his request for internal review and its application of the above exemptions to the remaining withheld information.
5. Following the Commissioner's intervention the HSE provided some further information to the complainant, however it still withheld some information citing sections 35 and 36 of FOIA as a basis for non-disclosure. Therefore, this notice only deals with the remaining withheld information.
6. The Commissioner has considered the HSE's handling of the complainant's request for information, in particular its application of the exemptions under sections 35 and 36 of FOIA.

Reasons for decision

7. Section 35(1)(a) of the FOIA states that information is exempt if it is held by a government department and relates to the formulation and development of government policy. It is a class-based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
8. The Commissioner considers that the term 'relates to' can safely be given a broad interpretation. The exemption is qualified and a public authority would be obliged to disclose information where it was in the public interest to do so.
9. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
10. The complainant argues that the information withheld under section 35(1)(a) is departmental, rather than government, policy. The HSE

disagrees. The HSE reports direct to the Department of Work and Pensions (DWP) and the information withheld directly relates to advice provided by the HSE to DWP ministers in relation to the formulation of government policy.

11. Government policy may be formulated and developed in Cabinet and agreed jointly by Ministers but equally it may be formulated and developed in an individual department. The UCL study on *Understanding the formulation and development of government policy in the context of FOI*¹ says that Ministers very often make policy decisions without the issue being raised at Cabinet or agreed with other departments. It also says that:

"Policies which emerge from Whitehall and Westminster are essentially regarded as reflecting 'government' policy even when they have effectively been developed by a single Department. Policies endorsed by Ministers are regarded as government policy whether or not they have been signed off inter-departmentally."

Involvement of officials

12. The UCL study explains at 5.26 that departmental civil servants are involved in the policy development process:

"The cutting edge of policy work – the detailed analysis of policy issues at their various levels of granulation – is therefore usually carried out further down the hierarchy, notably at the lowest SCS level (grade 5, payband 1) working with their direct reports, just below the SCS. It will thus generally fall to people at that level to develop the necessary in depth understanding of the issues; and to work out the policy options; and in due course consider how the chosen approach is best delivered. Most of the detailed policy drafting - whether that eventually emerges in green or White Papers, background documents or speeches - is also initiated just below the SCS."

13. The study refers to these civil servants as 'engine room' officials. Departments develop and implement policy in the areas for which they have responsibility. The policy which they and their 'engine room' officials develop in these areas can be considered to be government policy.

¹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/research_and_reports/ucl_report_government_policy_in_the_context_of_foi.pdf

14. The Commissioner has perused the information, i.e. the extracts from minutes of the HSE's Senior Management Team meetings, being withheld under section 35(1)(a). Having considered the information, he is satisfied that it relates to policy decisions being deliberated by the HSE and advice provided. As government governs through its main departments, and through them to their NDPBs, of which the HSE is one, the Commissioner is satisfied that the information relates to the formulation and development of government, rather than departmental, policy. Therefore he is satisfied that section 35(1)(a) is engaged.

Public interest test

15. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test i.e. whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

16. The Commissioner recognises the general public interest in promoting openness, transparency, public understanding and accountability in relation to the activities of public authorities. This is particularly relevant in relation to a body such as the HSE which is responsible for encouraging, regulating and enforcing health, safety and welfare in the workplace and whose activities could potentially have a significant impact on large numbers of people.
17. The Commissioner has considered the content and nature of the information being withheld under section 35(1)(a), which comprises of minutes of meetings containing discussions regarding advice to DWP Ministers about various aspects of the HSE'S policies and functions and proposed policy implementation and changes.
18. The Commissioner considers that there is a legitimate public interest in the disclosure of the information being withheld under section 35(1)(a) in order that the public might have a better understanding of the process by which the policy was formulated. The Commissioner acknowledges that there is a strong public interest in understanding the practical operation of the HSE, the decisions to introduce certain policies to facilitate that operation and the thinking behind those decisions. The Commissioner accepts that disclosure of the information withheld under section 35(1)(a) would inform the public as to the way the HSE explored different policy options.

Public interest arguments in favour of maintaining the exemption

19. The Commissioner recognises that it may be argued that it is in the public interest for government to have a private, “safe space” in which to formulate policy, and that such arguments carry particular weight where policy formulation was ongoing at the time of the request.
20. The HSE argues that government, with input from others, should be given sufficient space away from public scrutiny to carry out the policy making process effectively. This includes protecting the government’s ability to gather free and frank input from others to inform its decisions. There is a public interest in ensuring that options are fully debated and that people are not deterred from providing full and frank suggestions and input to ensure that the best options are put forward. The HSE argues that disclosure of policy proposals too early would be detrimental to the process of policy formulation and development and would be likely to lead to a loss of frankness and candour.
21. The HSE further argues that disclosure of the information would be likely to result in the risk of damage or inhibition to the ongoing discussions with a view to final policy formulation and may pose a risk to the quality of records, and good working relationships within government in this area. This would not be in the public interest.
22. The HSE further argues that it, like many public authorities, is having to formulate and develop policy as a result of budgetary changes and constraints and some of the options being considered are extreme. There is a very strong public interest in maintaining the confidentiality of the policy-making process, which would be eroded by disclosure of information relating to the ongoing formulation and development of policy.

Balance of the public interest arguments

23. The Commissioner accepts that there is a general public interest in transparency and accountability in government and a more specific public interest in being informed about the activities of a public body which could have a significant impact on large numbers of people. He also accepts that there is a further, more specific public interest in being able to assess whether government ministers have received the best quality advice possible in order to enable them to make the best possible decisions based on that advice. The Commissioner considers that there are valid public interest arguments both for and against disclosure of the withheld information and has gone on to balance both sets of arguments in order to ascertain whether one set of arguments outweighs the other in all the circumstances of the case.

24. In considering the balance of the public interest arguments the Commissioner has taken into account the underlying principles involved in balancing the public interest test under section 35(1)(a) which were set out by the Tribunal in the *DFES* case. The Commissioner has focused on two of these principles in particular, the first being the timing of the request:

"The timing of a request is of paramount importance... Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the... threat of lurid headlines depicting that which has been merely broached as agreed policy."

25. The second principle relates to the content of the information itself, on which the Tribunal commented:

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

26. In relation to the question of timing, the HSE has argued that the information withheld under section 35(1)(a) relates to current policy formulation and that its premature disclosure could have a "chilling effect" on future expressions of opinion by relevant individuals, leading to the risk of inhibition of or damage to future decision-making.
27. The Commissioner has considered the content of the information and the timing of the request and how they affect the weight of the public interest arguments. At the time of the request, the policies under discussion had not been finalised. The HSE argued the premature disclosure of information relating to the relevant policies would be detrimental to the policy-making process as a whole, both now and in the future, as this could lead to a loss of frankness and candour.
28. Whilst the Commissioner has attributed some significance to the chilling effect argument primarily in view of the timing of the request, he notes that the HSE's submissions did not include specific evidence linked to the circumstances of this case to further support this argument. Nor has the HSE identified specific parts of the information withheld under section 35(1)(a) which are particularly free and frank and more likely to result in a loss of candour. If such evidence had been provided it may have added more weight to this argument.

29. As mentioned above the HSE has also argued that individuals would be discouraged from providing frank and candid advice and input in the future if they thought that their views may be disclosed. The Commissioner considers that as experts in their field who are contributing to policy debate the same courage and independence should be expected of them as of the civil servants mentioned by the Tribunal in the case of the Foreign and Commonwealth Office v The Information Commissioner². Therefore, he has attached limited weight to this argument.
30. The Commissioner has considered what the HSE has said regarding the need to maintain the confidentiality of the policy-making process. This is a particularly strong argument in times such as these, when public authorities are all, due to budgetary changes and restrictions, having to make policy changes. Any proposed changes need to be discussed thoroughly and the Commissioner understands that some of the options under consideration may be extreme. Premature disclosure of information relating to these discussions would erode the confidentiality of the policy-making process and would discourage records being kept to document the thorough discussion of all options. This would undermine the policy-making process and could lead to a poorer quality of decision-making, which would obviously not be in the public interest. The Commissioner considers that this is a very strong argument in favour of maintaining the exemption.
31. The Commissioner has considered all public interest arguments and concludes, on balance, that, in all the circumstances of the case, the public interest in maintaining the exemption under section 35(1)(a) outweighs that in disclosing the information.

Section 36 Exemption

32. The HSE has applied sections 36(2)(b)(ii), 36(2)(c) and 40(2) of FOIA as a basis for withholding the outstanding withheld information, i.e. that information to which section 35(1)(a) does not apply. The Commissioner has considered the application of these exemptions. The relevant parts of section 36(2) state that,
"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
(b) would, or would be likely to, inhibit-
(i) the free and frank provision of advice, or

² EA/2007/0047

- (ii) *the free and frank exchange of views for the purposes of deliberation, or*
- (c) *would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*
33. This is a qualified exemption, and is therefore subject to the public interest test.
34. The Commissioner has first considered the application of section 36(2)(b)(ii) to the withheld information.
35. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, lead to the adverse consequences described in that part of the exemption – in this case the inhibition of the free and frank exchange of views for the purposes of deliberation.
36. In order to consider the application of these exemptions the Commissioner will first consider whether the opinion was obtained from a qualified person, and the manner in which this opinion was obtained. reasonable.
37. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
- ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
38. The HSE has informed the Commissioner that the qualified person in this case was Mr Geoffrey Podger, the Chief Executive of the HSE. The Commissioner is satisfied that Mr Podger is a qualified person for the HSE.
39. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.

40. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC1*³ (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus, *'does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'*.
41. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
42. The Commissioner considers that the withheld information relates to discussions surrounding HSE's policies and functions. The opinion of the qualified person is that disclosure of the information withheld under section 36(2)(b) may inhibit the frankness and candour with which views are exchanged and advices given. The need for such frankness and candour is required as part of the decision-making process. The qualified person argues that disclosure would be likely to suppress the freedom with which officials discuss particular issues and options. It is his view that disclosure would be likely to impact upon advice and/or recommendations from junior colleagues, which are relied upon by HSE officials.
43. The Commissioner accepts that it is a reasonable opinion that if the withheld information were disclosed it would be likely to cause those involved to be less frank and candid in their exchange of views, opinions and deliberations. Whilst the Commissioner does not accept that individuals would be completely put off being involved in these discussions, it is not unreasonable to conclude that the frankness and candidness of the discussions would be likely to be affected which would have a damaging impact on the ongoing decision-making process.
44. The opinion of the qualified person was provided verbally, however the HSE has provided a form recording that opinion and signed by the qualified person, as per the Commissioner's guidance. Having considered that form and the information being withheld under section

³ EA/2006/0011 & EA/2006/0013

36(2)(b), the Commissioner considers that the opinion of the qualified person is reasonable. The Commissioner is also satisfied that section 36(2)(b) (ii) applies to the whole of the withheld information and therefore he has not considered the application of section 36(2)(c) in this decision notice.

Public interest test

45. Section 36(2)(b)(ii) is subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining these exemptions outweighs the public interest in disclosure. The Commissioner has first considered the public interest in favour of disclosure.

Public interest arguments in favour of disclosing the withheld information

46. The HSE recognises that there is a public interest in increasing openness, transparency and accountability in the decision-making processes of any public sector organisation. The Commissioner agrees that this is the case.
47. The HSE also recognises, as agreed by the Commissioner, that there is a strong public interest in understanding the decision-making process. Disclosure of the withheld information would allow the public to better understand and to have a more informed debate on the process and the operation of the HSE in general. The Commissioner has gone on to consider the public interest in maintaining the exemption.

Public interest arguments in favour of maintaining the exemption

48. In favour of maintaining the exemption as set out in section 36(2)(b)(ii) the Commissioner notes that when considering the public interest consideration should be given to protecting what is inherent in these exemptions – in this instance, the avoidance of unwarranted inhibition to the free and frank exchange of views for the purposes of deliberation.
49. The HSE has argued that there is a very strong public interest in HSE officials having the freedom to express free and frank views and opinions. HSE officials rely, as stated in paragraph 43, upon advice from junior colleagues and the HSE argues that fear of premature disclosure of discussions would impact upon the quality and candour of that advice and therefore lead to impaired decision-making.

Balance of the public interest arguments

50. In finding that the above exemption is engaged, the Commissioner has already accepted that the disclosure of this information is likely to result in the inhibition set out in the exemption. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any inhibition that would or might occur. He has considered the nature and content of the withheld information and the timing of the request.
51. The withheld information consists of certain extracts from minutes of the HSE's Senior Management Team meetings. The Commissioner has examined these and has ascertained that they relate to a number of issues, for example HSE'S provision of services and its functions. The information contains a number of views and opinions expressed in those meetings and details a number of options explored and courses of action taken or to be taken.
52. The Commissioner understands that these meetings are ongoing monthly throughout the year to discuss various aspects of the HSE's work and to develop policy and make decisions after discussion. The meetings were obviously ongoing at the time of the request and the content of discussions within those meetings were and still remain live issues. Those involved need time and space for free and frank discussions regarding the best and most appropriate way to implement proposals, provide advice and decide upon options, in line with the HSE's core functions.
53. The Commissioner considers that there is a strong public interest in openness, transparency and accountability of the decision-making processes of public authorities. He also considers that there is a strong public interest in allowing the public to be better-informed about the operation of HSE and the decision-making process which takes place within it.
54. However, given the nature of the withheld information and the timing of the request, the Commissioner considers that significant prejudice would be likely to occur if the withheld information were to be disclosed. As stated above, discussions and exploration of options within meetings is an ongoing process. Therefore those involved need time and space for free and frank discussions regarding the best and most appropriate ways to carry out processes and functions and to decide upon options.
55. The HSE maintains that, if the withheld information were to be disclosed, this would be likely to inhibit the effectiveness of the

discussions which could result in poorer decision-making and perhaps inhibit some individuals from participating in the discussion process altogether. The Commissioner accepts that such inhibition would be a likely effect of disclosure and would be likely to disrupt to a large extent the effectiveness of the ongoing process.

56. Although there is a strong public interest in transparency and accountability in public authorities, the Commissioner believes that this has been satisfied to some extent by the HSE's routine disclosure of meeting minutes on its website. The withheld information, as stated, consists of extracts from those minutes, which the HSE feels cannot yet be disclosed due to their nature. The Commissioner is satisfied that the HSE has disclosed as much as it can in this case.
57. Therefore, the Commissioner's conclusion is that, in all the circumstances of the case, the public interest in maintaining the exemption set out in section 36(2)(b)(ii) of FOI outweighs that in disclosure of the withheld information.

The Section 40(2) exemption

58. The HSE considered that some of the withheld information was personal data of third parties and was therefore exempt under section 40(2) of FOIA. Since the Commissioner considers that sections 35(1)(a) and 36(2)(b)(ii) apply to the entirety of the withheld information, he has not considered the HSE's application of section 40(2) in this instance.

Procedural requirements

59. Section 1(1) of FOIA states: -

"Any person making a request 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.

Section 10(1) of FOIA states: -

"Subject to subsections (2) and (3) a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the day of receipt."

60. The HSE stated to the complainant that it required an extension of time to consider the public interest test in relation to the requested information. It subsequently provided some of that information to the complainant. The Commissioner finds that the HSE was in breach of section 1(1)(b) of FOIA as it did not provide the information within the 20 working day time limit as set out in section 10(1) of FOIA.

Other matters

61. The Commissioner's guidance states that an internal review should be carried out within 20 working days unless the circumstances are exceptional, in which case it should be carried out no later than within 40 working days. In this case, the complainant drew the Commissioner's attention to the fact that the HSE had exceeded the 40 working day time limit in which to provide him with the results of its internal review. The Commissioner would remind the HSE that he considers it to be good practice to provide a complainant with the results of an internal review within the appropriate time limit.
62. The Commissioner is concerned with the length of time taken by the HSE to respond to his correspondence in relation to his investigation. The Commissioner will continue to monitor the HSE's compliance with FOIA and has noted the details of this case in particular.

Right of appeal

63. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

64. 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.
65. 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

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