

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2021

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 information relating to an investigation carried out by the Health and Safety Executive (the HSE) into a construction site. The HSE withheld the requested information under section 30(1)(b) (power to investigate offences and conduct proceedings) of the FOIA.
2. The Commissioner's decision is that the requested information is exempt from disclosure under section 30(1)(b) of the FOIA and the public interest favours maintaining the exemption.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Background

4. The Commissioner understands that in February 2019, the HSE was notified of a concern relating to unsafe working practices at a construction site owned by a limited company, of which the complainant is one of the directors. An HSE inspector visited the site and concluded that the incident observed had the potential to cause personal injury to one or more individuals through failings in management systems. The company was immediately served with two prohibition notices preventing it from operating the practices observed, and the HSE commenced a full investigation. The Commissioner understands that this investigation has been placed on hold because the complainant has appealed these notices.

Request and response

5. On 12 August 2019, the complainant wrote to the HSE to request the following information:
 - (1) *"All notes of telephone conversations, copies of emails and/or photographs arising from the report or reports to HSE made by our neighbour.*
 - (2) *All internal HSE documents, emails, memos etc. recording staff analysis of the allegations referred to in (1) and directing any actions to be taken, including of course instructions to [name 1 redacted] and any other HSE operative involved.*
 - (3) *Copies of any 'advice' tendered to [name 1 redacted] by [name 2 redacted], as referred to in the leger to me from [name 3 redacted], dated 25 April.*
 - (4) *Copies of any internal documents identifying specific equipment failure risk or operative risk relied upon to support the issue of the notices under appeal."*
6. The HSE responded on 30 August 2019 and refused to provide the requested information, citing the exemption under section 30(1)(b) of the FOIA as its basis for doing so.
7. The complainant requested an internal review of the HSE's decision on 12 September 2019.
8. Following an internal review, the HSE wrote to the complainant on 9 October 2019 maintaining its original position.

Scope of the case

9. The complainant contacted the Commissioner on 14 October 2019 to complain about the way his request for information had been handled.
10. During the course of the investigation, the complainant advised the Commissioner that he had received a list of documents produced by the HSE in relation to an Employment Tribunal Court Order. The complainant explained that if the requested documents were provided in relation to the Court Order then his complaint would cease to be necessary. However, the complainant later confirmed that the list did not include the information requested in this case and that he wished to proceed with the complaint.

11. The Commissioner therefore considers the scope of this case is to determine whether the HSE is entitled to rely on section 30(1)(b) of the FOIA as a basis for refusing to provide the withheld information.

Reasons for decision

Section 30(1)(b) - power to investigate offences and conduct proceedings

12. Section 30(1)(b) provides that information is exempt if it has been held at any time for the purposes of 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 the power to conduct.
13. 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, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing if it is subsequently used for this purpose.
14. Consideration of section 30(1)(b) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Is the exemption engaged?

15. The first step is to address whether the requested information falls within the class specified in section 30(1)(b).
16. The Commissioner has issued guidance on section 30(1)(b) which clarifies that the exemption *"... 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."*
17. The HSE has stated that it is the statutory body responsible for the regulation and enforcement of workplace health, safety, and welfare within the UK and that its statutory powers and responsibilities are derived from the "Health and Safety at Work etc. Act 1974" (HSWA) and associated relevant statutory provisions. It explained that sections 20 to 23 of the HSWA and associated legislation provide HSE inspectors with

powers of entry to workplaces, powers to investigate incidents and powers to take enforcement action, including prosecution, against those responsible for offences under the HSWA and associated legislation. The Commissioner notes that the HSE inspectors' power to bring prosecutions is given under section 39 of the HSWA.

18. Section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence, or the power to conduct such investigations and/or institute criminal proceedings. The HSE clearly has a duty to investigate whether someone should be charged with an offence under the 1974 Act, it has the power to conduct such investigations and the power to institute criminal proceedings. The Commissioner does therefore consider that the information requested would fall within the class of section 30(1)(b) FOIA.

Public Interest Tests

19. Section 30(1)(b) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
20. In accordance with her guidance, when considering the public interest in maintaining exemptions the Commissioner considers that it is necessary to be clear what the specific exemptions are designed to protect.
21. The purpose of section 30 is to preserve the ability of the police and other applicable public authorities to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged is whether the disclosure of the requested information could have a harmful impact on the ability of the authority to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of authorities to investigate crime effectively.

Public interest arguments in favour of disclosing the information

22. The HSE has stated that the public interest arguments in disclosing the withheld information at this time are limited and are of the view that the only public interest factor supporting disclosure is the general public interest in transparency and accountability.

Public interest arguments in favour of maintaining the exemption

23. The HSE has argued that the disclosure of the withheld information would be likely to reduce the chances of it bringing a successful

prosecution against the complainant and his company. This is because he would be likely to state that he would be unable to receive a fair trial in court because evidence of health and safety failures had been placed into the public domain ahead of a decision to prosecute.

24. The HSE has also argued that the disclosure would reduce the chances of a successful prosecution, should the investigation conclude this course of action is appropriate, because the Court is unlikely to accept any evidence that the HSE has previously disclosed into the public domain.
25. The HSE stated that the disclosure would be likely to impede the gathering of information and evidence in future investigations because those under investigation would be less willing to provide information voluntarily if they thought it would be placed into the public domain ahead of enforcement decisions. The HSE has stated that whilst it can obtain information using its statutory powers, compelled information is not always admissible in court. The HSE therefore always tries to seek information from those under investigation voluntarily.
26. The HSE has also argued that the disclosure would be likely to inhibit its ability to conduct further investigations effectively because third parties may be less willing to volunteer information to the HSE if it is disclosed into the public domain inappropriately. It stated that thousands of health and safety concerns are raised with the HSE every year by employees and members of the public and many of these concerns lead to a full investigation and potential prosecution. The HSE explained that, in this case, a member of the public raised a concern with it about the poor health and safety practices operated by the complainant because they were gravely concerned about the safety of both the complainant's staff and members of the public. If concerns raised with the HSE were to be disclosed into the public domain, it would be likely to have a prejudicial effect on the HSE's investigatory functions because it would lose the public's trust to investigate their concern in confidence.
27. The HSE stated that the disclosure would also be unfair to the complainant should the HSE decide not to proceed to prosecution, because information about the way he runs his company would be in the public domain and may impact on his business in the future.
28. In relation to the above point, the Commissioner would clarify that although the complainant has requested this information, any disclosure under the FOIA is made not only to the requestor, but to the public in general.

Balance of the public interest arguments

29. Having given due consideration to the arguments put forward by both parties, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.
30. In reaching this conclusion on the balance of the public interest, the Commissioner has considered the public interest in the HSE disclosing the requested information. She has also considered whether disclosure would be likely to harm the investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
31. The Commissioner considers that there is a strong public interest in openness and transparency, particularly in relation to information relevant to the health and safety on construction sites.
32. The Commissioner also recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the investigations they carry out.
33. However, at the time of the request, the HSE stated to the complainant that its investigation was ongoing. The provision of the requested information at the time of the request would therefore have provided information on, and potentially prejudiced, an ongoing investigation where there remains the possibility that a prosecution would ultimately occur against any offences its investigation uncovered.
34. As set out above, the purpose of section 30 is to protect the effective investigation and prosecution of offences. It is in the public interest to protect the ability of the HSE to investigate potential offences, to gather evidence, and to successfully prosecute offences. A disclosure of information such as witness statements etc. to the whole world prior to an offence being prosecuted risks undermining the possibility of a successful prosecution being taken forward. This is therefore clearly not in the public interest.
35. The Civil Procedure Rules outline when, and where a disclosure of evidence should take place between parties should a prosecution of an offence take place. The courts manage this limited disclosure of information.
36. In view of the above, the Commissioner has decided that the exemption under section 30(1)(b) of the FOIA has been applied appropriately by the HSE, and that the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.

Right of appeal

37. 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

38. 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.
39. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF