

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 7 October 2022

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

Decision (including any steps ordered)

1. The complainant has requested information about the demolition work at a property, involving the removal of asbestos. The Health and Safety Executive (HSE) advised it does not hold some of the information the complainant has requested and has withheld other information under regulation 12(5)(b) of the EIR, which concerns the course of justice.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the HSE does not hold recorded information within scope of questions 2, 3 and 6 of the request and regulation 12(4)(a) of the EIR is engaged in respect of those questions.
 - Regulation 12(5)(b) is not engaged in respect of the information requested in question 5 of the request.
 - The HSE breached regulation 11(4) of the EIR as it did not provide an internal review within 40 working days of the request for one.
3. The Commissioner requires the HSE to take the following step to ensure compliance with the legislation.

- Disclose the information the complainant has requested in question 5 of their request.
4. The HSE must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 28 June 2021 the complainant wrote to the HSE and requested information in the following terms:

"1. Did the meeting between HSE and [name redacted] take place face to face or by telephone?

2. Approximately how long was the meeting or discussion and how many meetings took place?

3. Was any conclusion given to [name redacted] after the meeting(s)? ie did you advise that there were no issues of concern?

4. If you did advise [name redacted] there were no issues of concern, why have you subsequently taken enforcement action against 2 duty holders?

5. Am I able to ask which 2 duty holders had enforcement action taken against them?

6. You state in your response that a registered waste company removed the asbestos and that the asbestos was removed to a registered transfer station. Again, am I allowed to ask which company removed the waste and to which transfer station and what proof did HSE obtain to satisfy your enquiry?

7. I merely ask the above as you also advised that you were unable to act upon the complaint about removal of the asbestos due to lack of evidence. Whilst I accept the lack of evidence may be true, at no time over the weekend in question were sealed skips/containers in evidence and it is believed the asbestos was removed in the curtain sided vehicle reg no [redacted]. Even if this vehicle along with the other vehicle on site, [redacted], were not used, these vehicles were obviously in use by the demolition contractors and I find it hard to believe that a registered waste company who are no doubt steeped in red tape would be operating 2 untaxed vehicles with no MOT and therefore probably uninsured. Unfortunately this matter was never reported to the police

as suggested as it was thought that either the HSE or, South Ribble Council, Parish Council or even the village hall trustees would have been concerned enough to report the vehicles rather than leaving it to a member of the public.

8. Finally, on a similar note, whilst I accept you are unable to take action regarding the hours of work, again I raise the question as to whether a reputable and registered asbestos waste removal company would be working such late hours and over a weekend. Could it be that this was just coincidence or that in the event a complaint was made. HSE would be unable to investigate, as by the time you made enquires I believe the demolition work had been completed.”
6. The HSE responded on 5 July 2021. It withheld the information requested in questions 1 – 6 under regulation 12(5)(b) of the EIR. The HSE said it had not dealt with questions 7 and 8 as it had not engaged with the waste disposal company. It advised the complainant to contact its Concerns and Advice team about those concerns.
7. The HSE invited the complainant to request an internal review if they were not satisfied with its response.

Scope of the case

8. The complainant contacted the Commissioner on 8 July 2021 to complain about the way the HSE had handled their request.
9. The Commissioner advised the complainant to request an internal review which they did on 19 August 2021.
10. On 4 February 2022 the complainant told the Commissioner that they had not received a review response and on 7 February 2022 the Commissioner instructed HSE to provide a review. It did not go on to do so and the complaint was accepted for further consideration without a review having been carried out.
11. Progress on the complaint started in April 2022 and on 9 June 2022 the HSE provided the complainant with, effectively, an internal review. It had reconsidered its position and now addressed questions 1 and 4. The HSE advised it holds no recorded information within scope of questions 2, 3, 6 and 8; it withheld information within scope of question 5 under regulation 12(5)(b) and noted that question 7 was framed as a comment rather than a request for recorded information.
12. Having confirmed the scope of their complaint with the complainant, the Commissioner's investigation will focus on whether, on the balance of

probabilities, the HSE holds information within scope of questions 2, 3 and 6 of the request. The Commissioner had initially considered that the HSE's response to question 8 could be in scope. Reviewing this question again, however, he considers it to be a comment, or hypothetical proposition, and not a request for recorded information.

13. The Commissioner will also consider whether the HSE is entitled to withhold information relevant to question 5 under regulation 12(5)(b) of the EIR, and the balance of the public interest if necessary. Finally, the Commissioner will consider the HSE's handling of the internal review.

Reasons for decision

Regulation 12(4)(a) – information not held

14. Regulation 12(4)(a) of the EIR says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
15. In question 2, the complainant has asked how long a particular meeting was and how many such meetings took place. In question 3 the complainant has asked whether any conclusion from the meeting(s) was passed to a named individual. In question 6 the complainant has asked which company removed the waste, which transfer station the waste was taken to and what proof HSE obtained to satisfy an enquiry.
16. In correspondence to the Commissioner, the complainant has argued that the HSE does hold information relevant to these questions. They noted that in its initial response of 5 July 2021 the HSE had applied regulation 12(5)(b) to all of questions 1 – 6. This indicated to the complainant that the HSE must hold this information if it was refusing to disclose it.
17. With regard to question 3, the complainant says that since the HSE went to the trouble of making enquires with the individual named in their request, it is not credible that they would not have communicated any conclusions from related meetings to that individual.
18. The complainant has also noted that in correspondence they received from the relevant HSE investigating inspector on 19 May 2021, the inspector advised them that, with regard to question 6, a registered waste removal company removed the asbestos and took it to a registered waste transfer station. The complainant has queried how the inspector could advise this if the HSE did not hold any relevant recorded information.

19. In its submission to the Commissioner the HSE has noted the complainant's above points, which the Commissioner had passed to it.
20. With regard to question 2, the HSE says that its initial response to the request was intended to indicate that it held investigation material in general, but not that HSE held every item the complainant had listed. The HSE says it reviewed the response letter that was issued and has acknowledged that it was written in such a way that the complainant could easily misconstrue the situation and consider that the HSE held each individual requested item. The HSE says it will raise this with the staff member concerned to advise that they are more careful about how they word such responses in the future.
21. The HSE has confirmed that it does not hold recorded information on the duration and number of meetings held.
22. With regard to question 3, the HSE confirmed in its submission that this was not information held on its corporate system. However, the investigating inspector has confirmed that there were no issues the trustees of village hall in question needed to address and no action was taken against them. The individual named in the request was one such trustee.
23. The Commissioner notes that the HSE has acknowledged that the general way it had addressed the complainant's first six questions unsurprisingly led them to believe the HSE held recorded information within scope of all six of them. It has now confirmed that it does not hold information within scope of questions 2 and 3 and the Commissioner will accept that this is the case. There would not appear to be a strong business need to record the information requested in question 2 and the HSE had found there were no issues for the village hall trustees to address and so it had not been necessary to communicate further with the trustee referred to in the request.
24. The Commissioner is therefore satisfied that regulation 12(4)(a) of the EIR is engaged in respect of questions 2 and 3 of the request.
25. Finally, with regard to question 6, the HSE says that the complainant has received a number of emails from the investigating inspector. The purpose of those communications was to provide general feedback on the investigation that is their concern, how it progressed and the inspectors conclusions. This is the norm, to provide such general feedback. However, the HSE says, this correspondence would not go into detail about what corporate records or evidence HSE intended to retain on its systems once the investigation concluded.

26. The HSE has also confirmed that it did not consider this documentation [ie the information requested] to be significant for retention in its corporate system [and so it does not hold this information].
27. The Commissioner notes that in its initial response to the request the HSE had advised that it had not engaged with the waste company involved. It has now confirmed that it does not consider the requested information to be significant enough to retain and so does not hold it. The Commissioner sees no reason to doubt that that is not the case. He will accept that when the investigating inspector advised the complainant about the waste company and waste transfer station in correspondence in May 2021, this was general advice ie that the HSE would expect in such cases that the waste company and the transfer station would be registered [to manage asbestos], but it did not necessarily know, or need to know, their identities.
28. The Commissioner cannot consider whether the HSE should or should not record and retain particular information. He can consider solely whether, on the balance of probabilities, it does or does not hold it. With regard to question 6 of the request, having considered all the circumstances the Commissioner is satisfied that the HSE does not hold that information and that regulation 12(4)(a) is engaged.

Regulation 12(5)(b) – course of justice

29. Under regulation 12(5)(b) of the EIR, information is excepted from disclosure to the extent that its disclosure would adversely affect 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.
30. Under regulation 12(5)(b), the HSE has withheld the names of two duty holders who it took enforcement action against which the complainant requested in question 5.
31. In its initial response, the HSE advised only that it had applied regulation 12(5)(b) to that question. In its internal review, HSE explained that it does not name duty holders that have solely been subject to a notice of contravention letter. It would only name them if it had gone on to take further enforcement action such as issuing an Improvement or Prohibition notice or had successfully prosecuted them. In such instances, HSE said, it proactively publishes this information on our Register of Notices and Prosecutions on its website. However, that does not apply in this case.
32. In his initial correspondence to the HSE in April 2022, the HSE had provided questions the HSE should address to justify its reliance on

regulation 12(5)(b). Following its internal review to the complainant, the Commissioner wrote to the HSE again on 21 June 2022 and asked it to provide its submission by 5 July 2022, referring it back to the questions sent in April 2022. Because it appeared somewhat relevant, the Commissioner had also directed the HSE to his decision in IC-48253-T1V1¹. That case had also concerned information about the removal of asbestos from a property, to which the HSE had applied regulation 12(5)(b). The Commissioner had found that regulation 12(5)(b) was engaged but that the public interest favoured disclosing the information. The requested information and circumstances were not, however, exactly the same as in this case.

33. The HSE did not provide its submission until 4 October 2022. Despite having had in excess of three months to provide its reasoning for its reliance on regulation 12(5)(b) in this case (five months if the Commissioner's correspondence in April 2022 is taken into account), the HSE's submission is scant and does not address the specific questions the Commissioner put to it. In its submission, the HSE simply makes a point about the public interest test in IC-48253-T1V1 compared to this case.
34. As in the previous case, the Commissioner accepts that the HSE is the statutory body for the regulation and enforcement of the Control of Asbestos Regulations 2012. And that the primary focus of its investigation in this case was to establish if there had been a breach of these Regulations.
35. The Commissioner understands from the complainant that, at the time of their request, the investigation in question was complete. It may well be the case that the HSE only publishes the names of parties who have received a Prohibition or Improvement notice as the result of an investigation. However, for regulation 12(5)(b) to be engaged in this case, and before discussing the public interest, the HSE would need to have explained why disclosing the names of the two duty holders who received a notice of contravention letter following an investigation – who the Commissioner understands must be a business/businesses carrying out a work-related activity, rather than private individuals in a personal capacity - would adversely affect the HSE's ability to carry out that investigation (if it was not concluded) or future investigations.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2618721/ic-48253-t1v1.pdf>

36. The HSE has not provided that explanation and therefore the Commissioner cannot find that it has correctly applied regulation 12(5)(b) to the information requested in question 5. Because he has found that regulation 12(5)(b) is not engaged, it has not been necessary to consider the associated public interest test.

Regulation 11 – representations and reconsideration

37. Under regulation 11(2) of the EIR an applicant should request an internal review within 40 working days of receiving the public authority's response to their request.
38. Regulation 11(4) then places an obligation on the public authority to provide an internal review as soon as possible and within 40 working days of the request for one.
39. In this case, the complainant failed to request an internal review within the required timescale despite the HSE's response to their request inviting them to do so.
40. Following the Commissioner's intervention the complainant did request an internal review on 19 August 2021. The Commissioner acknowledges that the HSE provided an internal review despite the long interval between its response and the request for a review. However, the Commissioner must find that the HSE did not comply with the obligation under regulation 11(4) on this occasion as it did not provide the review response until 9 June 2022.

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: 0203 936 8963

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

Cressida Woodall
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