

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2024

Public Authority: Health and Safety Executive Northern Ireland
Address: 83 Ladas Drive
Belfast
BT6 9FR

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation undertaken by the Health and Safety Executive Northern Ireland (HSENI). HSENI provided some information but stated that it did not hold recorded information in respect of one part of the request (part 8).
2. The Commissioner's decision is that HSENI does not hold recorded information relating to part 8 of the request. No steps are required.

Request and response

3. On 6 September 2023 the complainant requested the following information from HSENI:

"1. On what dates did your senior investigator [named individual] visit the Orchard Leisure Centre in Armagh for the purpose of the HSENI investigation into the death of [named individual]?"

2. Who did [named individual] meet with when he visited the orchard leisure Centre Armagh (I don't want the names of those people just the positions held by them)

3. Can you please confirm what date [named individual] contacted the HSENI to speak with the investigator in charge of [named individual] case ([named individual]).

4. On what date did [named individual] return the call that I had made to your office, requesting to speak with him.

5. On what date did your office ([named individual]) contact the office of the PPS in relation to the death of [named individual].

- 6. On what date was your office contacted by the PSNI to start a joint investigation into the death of [named individual].*
 - 7. On what date was [named individual] replaced by [named individual] in the investigation into the death of [named individual].*
 - 8. Did the senior investigator [named individual] ask [named individual] to pick up the CCTV footage of the killing of [named individual] from the ABC COUNCIL. Did [named individual] declare a conflict of interest when asked to pick up the CCTV footage [personal information redacted].*
 - 9. Can you please confirm the date that the [personal information redacted] family solicitor ([named individual]) contacted your office."*
4. HSENI responded to the complainant on 3 November 2023. HSENI confirmed that it held relevant information but refused to disclose it, relying on the exemption at section 31(1)(g) of FOIA in conjunction with sections 31(2)(a), (c), (i) and (j).
 5. The complainant requested an internal review on 6 November 2023 and HSENI provided the outcome of that review on 4 December 2023. HSENI upheld its original response.

Scope of the case

6. The complainant contacted the Commissioner on 8 December 2023 to complain about the way their request for information had been handled.
7. The Commissioner understands that the complainant in this case is seeking information about HSENI's investigation into the death of a family member. The Commissioner acknowledges that the complainant will have understandable personal reasons for seeking access to information in such circumstances. However the Commissioner must stress that he can only make a decision as to whether or not a public authority has handled a request for information in accordance with FOIA.
8. As a result of the Commissioner's intervention HSENI issued a revised response to the complainant on 8 April 2024. At this point HSENI disclosed information in response to parts 1, 2, 5, 6, 7 and 9 of the request. It stated that it had already answered parts 3 and 4 as part of a subject access request made by the complainant. Finally, it stated that it did not hold information relating to part 8 of the request.
9. The complainant remained dissatisfied with HSENI's response. Specifically they complained that HSENI had not answered part 8 of the request.

10. Accordingly, the Commissioner considers that the scope of his investigation is to determine whether HSENI has responded to part 8 of the request in accordance with the requirements of FOIA.

Reasons for decision

Section 1: Information not held

11. Section 1(1)(a) of FOIA requires a public authority to inform the complainant in writing whether or not it holds the requested information. This is known as the duty to confirm or deny that information is held. If the public authority refuses to confirm or deny that the requested information is held, it must issue a refusal notice to the requester.
12. It is important to point out that FOIA only provides for recorded information to be disclosed into the public domain. Public authorities are not required to provide commentary or explanations that are not already recorded. In addition FOIA does not in itself require public authorities to hold information, it merely provides for access to information that is already held. The Commissioner cannot comment on whether a public authority ought to hold certain information, he can only decide whether or not, on the balance of probabilities, it does hold that information.
13. The Commissioner's published guidance states that when considering whether information is held, he will use the civil standard of proof, ie whether it is likely or unlikely on the balance of probabilities.¹ The Commissioner will consider the extent and quality of the authority's search for the requested information, any other explanations provided, and the complainant's reasons for believing that the information is held.

8. Did the senior investigator [named individual] ask [named individual] to pick up the CCTV footage of the killing of [named individual] from the ABC COUNCIL. Did [named individual] declare a conflict of interest when asked to pick up the CCTV footage [personal information redacted].

14. The Commissioner understands that HSENI has provided the complainant with a narrative response to part 8 of the request. HSENI has explained the circumstances under which the CCTV footage was collected by the named individual. However, HSENI has stated that this

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

information is not held in a recorded format, ie there is no written record of the individual being asked to collect the footage. Similarly, HSENI has advised that it does not hold any recorded information relating to a declared or potential conflict of interest. HSENI has further clarified that it is not required to create or record this particular information in order to carry out its statutory functions.

15. The Commissioner understands that the complainant feels that HSENI ought to be able to provide a record of its actions and the reasons for them. This is particularly important to the complainant given the context of the request.
16. The Commissioner observes that HSENI has not in this case conducted a formal or documented search for information falling within the scope of part 8 of the request. Rather, its position is based on consultation with relevant staff. In a relatively small public authority such an approach may be reasonable, provided that the authority is satisfied that it has taken appropriate and proportionate action which would be likely to result in the identification of relevant information.
17. However, the Commissioner is satisfied that HSENI has provided the complainant with an explanation and clarification of its position, ie that it does not hold the requested information at part 8 of the request because it has no need to create or generate it. As set out above above it is not for the Commissioner to comment on whether HSENI ought to hold information.
18. On the balance of probabilities the Commissioner finds that HSENI does not hold recorded information which is relevant to part 8 of the request. The Commissioner has also considered whether, if he were to uphold the complaint, he could specify any steps that HSENI could be required to take. In this case the Commissioner accepts that HSENI has provided a clear explanation of its position and he is of the view that there is nothing more he can require HSENI to do that would satisfy part 8 of the complainant's request.

Right of appeal

19. 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

20. 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.
21. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF