

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

Decision Notice

Date: 20 December 2010

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

Summary

The complainants requested a report prepared by British Gas from the Health and Safety Executive (HSE). The HSE withheld this information under Regulation 12(5)(b) of the Environmental Information Regulations 2004 (the EIR). The Commissioner is satisfied that Regulation 12(5)(b) is engaged and that the public interest favours the requested information being withheld.

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. In November 2008 the police notified the HSE of a possible escape of gas from a fire appliance in a house. A joint investigation was then undertaken between the police and the HSE with the police having primacy and the HSE providing technical support. As part of the investigation British Gas carried out an inspection of the fire appliance

in situ and prepared a report. It is this report that the complainants requested in June 2009. At this time the investigation was ongoing and the police had issued instructions to the HSE not to release any relevant information including the report from British Gas.

The Request

3. On 5 June 2009 the complainants requested a copy of the report prepared by British Gas.
4. The HSE responded on 17 June 2009 stating that it was not prepared to disclose the report under section 30(1)(b) of the Act as it related to an ongoing investigation which might result in the institution of criminal proceedings.
5. On 23 June 2009 the complainants requested an internal review
6. On 3 August 2009 the HSE upheld its original decision to withhold the requested information under section 30(1)(b) of the Act.

The Investigation

Scope of the case

7. On 7 August 2009 the complainants contacted the Commissioner to complain about the way their request for information had been handled.

Chronology

8. On 20 August 2009 the Commissioner wrote to the HSE requesting the withheld information and specific arguments as to which exemptions it intended to apply to it.
9. The HSE responded 24 September 2009 stating it would send the requested information to the Commissioner once a case officer had been allocated to the case. In the meantime it maintained that the information was exempt from disclosure under section 30 of the Act. It also suggested that as the requested information related to the possible escape of gas the matter could be looked at under the Environmental Information Regulations 2004 (the EIR). If this was the case the HSE said that it would withhold the information under Regulation 12(5)(b) of the EIR on the basis that disclosure would

adversely affect the course of justice, the ability of a person to received a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. It said that irrespective of whether it dealt with the request under the Act or EIR its public interests arguments for and against disclosure and the balance of these arguments against disclosure would be the same.

10. On 16 October 2009 the Commissioner requested the withheld information.
11. On 12 November 2009 the HSE sent the Commissioner the withheld information and said it now believed that it was covered by the EIR. Accordingly, it said it would withhold it under Regulation 12(5)(b).
12. On 16 November 2009 the Commissioner emailed the HSE and invited it to contact the complainant direct to explain why it had reconsidered the request under the EIR and applied Regulation 12(5)(b) to the information requested. The Commissioner said this would allow the complainant to consider the HSE's new arguments and if unhappy request an internal review.
13. On 17 December 2009 the HSE wrote to the complainants explaining that it had reconsidered the request under the EIR and applied Regulation 12(5)(b) to the information requested. It also stated that it had carried out a thorough review and re-evaluation of the case in line with the section 45 Code of Practice¹ as part of its first review under section 30(1) of the Freedom of Information Act 2000 in August 2009. As part of its reconsideration under the EIR the HSE pointed out that it had fully considered the case under Regulation 11 and upheld the original decision to refuse disclosure.
14. On 21 December 2010 the complainants wrote to the Commissioner with their detailed comments on the response letter from the HSE dated 17 December 2009 and in particular the HSE's application of Regulation 12(5)(b).
15. On 12 January 2010 the Commissioner passed a copy of the complainants' letter dated 21 December 2009 to the HSE for its consideration on the basis that the complainants' comments constituted 'representations' under Regulations 11(1) and 11(2) of the EIR.
16. On 29 January 2010 the HSE wrote to the complainants stating that it had reconsidered the matter but was still of the view that it was justified in withholding the requested information under Regulation 12(5)(b). The HSE also confirmed that its investigation was ongoing.

¹ Freedom of Information Act 2000

17. On 3 February 2010 the complainants wrote to the Commissioner explaining that they were still dissatisfied with the HSE's response.

Analysis

The Environmental Information Regulations 2004 (the EIR)

18. Regulation 2(1) of the EIR provides that environmental information may be written, visual, aural, electronic or in any other material form. In this case the information is held in written and photographic form.
19. Regulation 2(1)(a) of the EIR provides that environmental information includes any information on the state of the elements of the environment such as air and atmosphere.
20. Regulation 2(1)(b) of the EIR provides that environmental information includes any information on factors such as emissions, discharges and other releases into the environment affecting or likely to affect the elements of the environment in Regulation 2(1)(a).
21. The Commissioner is satisfied that the withheld information in this case is environmental within the definition in the EIR in that it is information on factors such as emissions, discharges and other releases into the environment affecting or likely to affect the elements of the environment in Regulation 2(1)(a). The British Gas report concerns the possible escape of gas which is information on the factor of emissions which affects or is likely to affect the elements of the environment such as air and atmosphere.
22. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request.
23. Regulation 12(2) of the EIR provides that 'a public authority shall apply a presumption in favour of disclosure'.

Exceptions

24. Regulation 12(1) of the EIR provides that (subject to the presumption in favour of disclosure) 'a public authority may refuse to disclose environmental information 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’.

Regulation 12(5)(b) of the EIR

25. Regulation 12(5)(b) provides that:

‘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’.

26. At the time of the request the HSE informed the complainants that the British Gas report was required for a criminal investigation for which the police had primacy. The HSE also informed the complainants that it had agreed not to release this report without the police’s agreement. The Commissioner is therefore satisfied that the withheld information was required for a criminal inquiry.
27. The Commissioner has considered whether disclosure of the requested information would adversely affect the HSE’s or the police’s ability to conduct a criminal inquiry, or would adversely affect the course of justice or the ability of a person to receive a fair trial. The Commissioner recognises that arguments that disclosure ‘might’ or ‘could’ have an adverse affect will not be sufficient.
28. The HSE has argued that disclosure of the report would have an adverse effect in that it would inhibit its ability to conduct further investigations, complete its inquiries and make an independent decision on enforcement action, including criminal proceedings, in this case.
29. The complainants disputed that disclosure would adversely effect the HSE’s investigation in this case. They said that report was a factual one and would not inhibit any future investigations that the HSE might undertake. The complainants have pointed out that the British Gas report was carried out on the gas fire in situ prior to it being removed. They therefore argue that it is not possible for anyone else to test the fire in situ or indeed inspect it. As a result of this they believe that disclosure of this report (which in their view is unlikely to be or cannot be changed) would not change in any way the course of the investigation.

30. The Commissioner does not accept the complainant's arguments that premature disclosure of the British Gas report would not have an adverse effect on the HSE's investigation because it is a factual one and will be disclosed by them in the event of criminal proceedings being commenced. Firstly he considers that the report is not purely factual but also contains some expression of professional opinion. Secondly, whilst he accepts that the information within the report itself is unlikely to change he considers that factual evidence and opinions can lead to further avenues of enquiry that need to be investigated. In the Commissioner's view disclosure of the report into the public domain would inhibit the HSE's ability to follow up any such leads independently and without relevant parties being forewarned of the nature of the further enquiries. The Commissioner therefore believes that disclosure of the report at the time of the request would have undermined the HSE's and the police's ability to properly conduct their investigations, assess evidence and consider criminal prosecutions. He is satisfied that the premature disclosure of the report would deny the HSE the space to determine the course of its investigation.
31. A further argument put forward by the HSE is that disclosure would prejudice its ability to communicate fully, frankly and in confidence with stakeholders, individuals and organisations. It believes that this would inhibit its ability to conduct future investigations thoroughly and effectively because third parties would be less willing to volunteer information.
32. In considering this point the Commissioner has referred to his earlier decision in the similar case of the [Health and Safety Executive FS50223414](#)². In this case the Commissioner accepted at paragraph 25 that disclosure of witness statements whilst the Health and Safety Executive's investigation was ongoing would have an adverse effect on its ability to conduct its investigations, because witnesses would be deterred from, either coming forward at all, or making free and frank statements, for fear of disclosure of their statements into the public domain. The Commissioner considers that this argument is not as strong in the circumstances of this case as the report does not involve the disclosure of personal witness statements. He considers that authors of reports such as the one in question in this case would not be easily deterred from providing their professional opinion. He also considers that what would be more likely to deter personal witnesses from coming forward or providing free and frank statements would be the disclosure of other personal witness statements that might cause them to fear that their own statements would be similarly released. The Commissioner therefore does not consider that the HSE's arguments on this point are very convincing. Nevertheless he has

² http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50223414.pdf

accepted that the previous argument, as detailed in paragraphs 28 to 30, is sufficient to mean that disclosure of the information would adversely affect the HSE's and the police's ability to conduct an inquiry of a criminal nature.

33. The HSE has also argued that disclosure of the report would prejudice the rights of suspects to be tried in the criminal courts. The HSE said that it takes its role as a regulatory authority very seriously and would not want to release to the world any information which might result in it failing to fulfil this role. For example, if a defendant argued that they could not get a fair trial because information had been released into the public domain. The HSE confirmed that although a decision to prosecute had not been made at the time the request was received it would disclose the requested information in the course of any subsequent proceedings taken to any affected party as part of the statutory disclosure regime. However, it also confirmed that it would not disclose the information to the public at large.
34. The complainants disputed that disclosure of the report would prejudice the rights of suspects to be tried in the criminal courts. They have pointed out that the report would have to be disclosed at some stage in the event of any criminal proceedings being taken in the future.
35. In the Commissioner's view the fact that the report may be disclosed to the complainants if criminal proceedings are commenced is not relevant because under the EIR the Commissioner has to consider the effect of disclosure to the general public not just disclosure to any of the affected parties. Although the report might potentially have to be disclosed to parties to any future proceedings this would not necessarily lead to its disclosure into the public domain.
36. The Commissioner accepts the HSE's arguments as set out at paragraph 33 above and is therefore satisfied that premature disclosure of the report would undermine the independence of the judicial and prosecution processes and the ability of the HSE to prosecute.
37. In light of all of the above the Commissioner finds the exception is engaged

Public interest arguments in favour of disclosing the requested information

38. The HSE has acknowledged that disclosure of the requested information would promote transparency and accountability in its investigation and enforcement activities.

39. The HSE has also acknowledged that disclosure would allow individuals and companies to understand its decision-making process.
40. The complainants have argued that they need a copy of the report so that their own independent expert can consider its contents and so that it can be used in dealing with civil claims in which they are involved.
41. Although the HSE accepts that the complainants have a genuine and private interest in seeing the requested information, it does not believe that the private interests of the person seeking the information are relevant. In support of this view the HSE cited a quote from the Commissioner in his Decision Notice [FS50089844](#)³. Although this case dealt with the application of section 30(1) of the Freedom of Information Act 2000 (the Act), the HSE believes that the reasoning is equally relevant to the public interest test under the EIR. The relevant quote is as follows:

. 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 interests (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.

42. The complainants state that they accept that the private interests of the person requesting the information are not relevant. However, they still believe that it is relevant that they were not given an opportunity to inspect and/or view the fire in situ, and also when it was being removed.
43. The Commissioner's agrees with the HSE that the arguments put forward by the complainants in this respect relate to private rather than public interests and as such are not relevant arguments, under the Act, in favour of disclosure of information into the public domain. He accepts that the arguments at paragraphs 38 and 39 are valid public interest arguments in favour of disclosure.

Public interest arguments in favour of maintaining the exception

³ http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50089844.pdf

44. The HSE acknowledges that there is a presumption in favour of disclosure under Regulation 12(2) of the EIR but maintains that in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure.
45. The HSE put forward the following arguments as public interest arguments in favour of maintaining the exception:
- The ongoing investigation and consideration of criminal proceedings;
 - Inhibiting HSE's ability to conduct further investigations complete its inquiries and make an independent decision on enforcement action including criminal proceedings;
 - Prejudice to the rights of suspects to be tried in the criminal courts;
 - Prejudice to the ability of HSE to communicate fully, frankly and in confidence with stake holders, individuals and organisations. This would inhibit HSE's ability to conduct future investigations thoroughly and effectively because third parties would be less willing to volunteer information;
 - The potential for circumventing the statutory disclosure regime in relation to criminal investigations and proceedings provided by the Criminal Procedure and Investigations Act 1996.
46. The Commissioner considers that there is a public interest in allowing investigating bodies the space to determine the course of an investigation, and not prejudicing specific investigations, because this should lead to more soundly investigated criminal inquiries. The Commissioner accepts that this public interest argument will carry less weight, once an investigation has been completed. However in the circumstances of this case, the investigation was still in progress and, for the reasons set out at paragraphs 27 to 30 above, the Commissioner accepts that the potential for prejudice to result from this disclosure was significant. He therefore affords considerable weight to this factor.
47. The Commissioner also agrees that there is a public interest in not prejudicing the ability of a person to receive a fair trial. For the reasons set out at paragraphs 33 to 36, he accepts that the disclosure of information before it has been decided whether or not to pursue criminal proceedings, would lead to this significant prejudice. Similarly, and despite the complainants assertion that their request is not an attempt to circumvent the statutory disclosure regime, he accepts the HSE's contention that there is a public interest in avoiding the circumvention of the statutory disclosure regime in criminal proceedings and investigations, as ultimately these statutory provisions are provided to protect the ability of a person to receive a fair trial. He therefore affords considerable weight to these arguments.

49. The Commissioner has, however, afforded no weight to the HSE's argument that there is a public interest in maintaining this exception in order to avoid endangering the confidentiality of information provided by individuals and organisations. This is because the HSE has not explained, and it is not otherwise evident to the Commissioner, why this public interest argument is inherent in this particular exception.

Balance of the public interest arguments

50. In light of all the above the Commissioner concludes that the considerable weight in maintaining the exception is sufficient to outweigh the public interest in disclosure as set out above. He does not accept it is in the public interest to disclose evidence prematurely as to do so would undermine the independence of the judicial and prosecution processes, adversely affect the HSE's ability to bring prosecutions and undermine a fair trial.

Procedural Breaches

51. As the HSE initially responded to the complainant's request under the Freedom of Information Act 2000 as opposed to the EIR it breached Regulation 14(3)(a) of the EIR by failing to cite the correct exception.

The Decision

52. The Commissioner's decision is that the HSE dealt with the request for information in accordance with the EIR in that it correctly applied the exception at regulation 12(4)(b)
53. However, it did not deal with the request in accordance with the EIR in that it breached Regulation 14(3)(a).

Steps Required

54. The Commissioner requires no steps to be taken

Right of Appeal

55. 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 sent.

Dated the 20th day of December 2010

Signed

**Lisa Adshead
Group Manager**

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

Legal Annex

Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1)

In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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 elements of the environment referred to in (b) and (c);

"historical record" has the same meaning as in section 62(1) of the Act;

"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means –

- (g) a body referred to in section 80(2) of the Act; and

- (h) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

"transferred public record" has the same meaning as in section 15(4) of the Act; and

"working day" has the same meaning as in section 10(6) of the Act.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1)

Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (i) an exception to disclosure applies under paragraphs (4) or (5); and
- (j) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2)

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

Regulation 12(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.

Regulation 12(4)

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (k) it does not hold that information when an applicant's request is received;
- (l) the request for information is manifestly unreasonable;
- (m) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (n) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (o) the request involves the disclosure of internal communications.

Regulation 12(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 –

- (p) international relations, defence, national security or public safety;
- (q) 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;
- (r) intellectual property rights;
- (s) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (t) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (u) 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
- (i) has not consented to its disclosure; or
- (v) the protection of the environment to which the information relates.

Regulation 12 (6)

For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7)

For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8)

For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9)

To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10)

For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11)

Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not

reasonably capable of being separated from the other information for the purpose of making available that information.

Regulation 14 - Refusal to disclose information

Regulation 14(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.

Regulation 14(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.

Regulation 14(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).

Regulation 14(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.

Regulation 14(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.