

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2016

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

Decision (including any steps ordered)

1. The complainant made a request to the Health and Safety Executive (HSE) for information about a complaint that he had previously made against a tradesman. The HSE disclosed some information but other information was withheld under the exemptions in section 40(2) (personal information) and section 41 (information provided in confidence).
2. The Commissioner has decided that the withheld information is exempt under section 40(2) and he requires no steps to be taken.

Request and response

3. On 14 September 2015 the complainant made a request for information to the HSE which read as follows:

"Under the FOI, I wish to ascertain a copy of the outcome of your consideration regarding the Unregistered Investigation Report that was forwarded onto your office by [a named individual], Regional Investigations Officer for Gas Safe Register".

4. The HSE responded to the request on 6 October 2015 when it disclosed letters and case notes related to the case which was the subject of the request. However, it also said that it held 'further correspondence

related to this matter' which was being withheld under the exemptions in section 41 (information provided in confidence) and section 21 (information accessible by other means). The Commissioner understands that section 21 has only been applied to a copy of the Gas Safe Report on the basis that the complainant already had a copy of this document and that therefore this element of the request is not in dispute.

5. The complainant subsequently asked the HSE to carry out an internal review of its handling of the request. This was initially arranged via the telephone although after the HSE agreed to carry out an internal review the complainant sent an email on 16 October 2015 to confirm that he wanted the HSE to review its decision to withhold information under the section 41 exemption.
6. The HSE presented its findings on 29 October 2015. The review upheld the application of section 41 but also explained that the withheld information was considered to be additionally exempt under section 40(2) (personal information).

Scope of the case

7. On 2 November 2015 the complainant contacted the Commissioner to complain about the HSE's decision to withhold the further correspondence which it referred to in its response to the request.
8. During the course of the Commissioner's investigation the complainant also suggested that he wished to challenge a small number of redactions that HSE made to the documents it disclosed.
9. The Commissioner considers the scope of his investigation to be to consider whether any of the withheld information is exempt from disclosure under section 40(2) and/or section 41.

Reasons for decision

10. During the course of the Commissioner's investigation the HSE referred to the fact that its initial response had made reference to further correspondence that it held regarding the complaint and that this was being withheld under section 41, and later section 40(2). However, the HSE now questioned whether this information fell within scope of the request. It explained that the complainant had actually asked for a copy of the outcome of HSE's consideration regarding the Unregistered

Investigation Report – not all correspondence on the issue. It said that the fact that this was mentioned led the complainant to complain that he had not received all the information as some was withheld from him. It added that his request for an internal review was not submitted in writing, but was transcribed from a telephone complaint he made to HSE.

11. In light of this, the first thing to consider is whether the disputed information falls within the scope of the request and the Commissioner does have some sympathy with the argument that it does not. On a strict interpretation it is certainly possible to argue that the information is not captured by the request. The withheld information, the 'further correspondence' referred to by the HSE in their response to the request, comprises letters from the tradesman who was the subject of the complaint to the HSE and which were sent in response to the HSE's investigation of the allegations. They do not record the outcome of the investigation although they are of course related to the investigation and helped inform its outcome. However, it also true that the complainant objected to this information being withheld which suggests that he considered it part of his request. The HSE also agreed to reconsider this information at the internal review stage and appears happy to accept that the information is covered by a broad interpretation of the request. Therefore, for these reasons and for the sake of completeness the Commissioner has gone on to consider whether this information is exempt from disclosure.

Section 40(2) – Personal information

12. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles.
13. The withheld information in this case comprises letters from the tradesman who was the subject of the complaint to the HSE in response to their enquiries. The name of the tradesman was also redacted from information which was disclosed to the complainant which included case notes from its electronic casework system as well as letters sent to the tradesman.
14. In applying the section 40(2) exemption, the first thing to consider is whether the information is personal data. Personal data is defined in the Data Protection Act 1998 as:

"personal data" means data which relate to a living individual who can be identified—

*(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;*

15. The withheld information here clearly identifies the individual and reveals that he was the subject of a complaint to the HSE. The Commissioner is satisfied that this amounts to personal data and therefore the next thing to consider is whether disclosure would contravene one of the data protection principles.
16. The HSE has said that disclosure would contravene the first data protection principle which requires that personal data be processed fairly and lawfully. In assessing whether disclosure would be unfair (and thus constitute a breach of the first principle) the ICO takes into account a number of factors such as:
 - Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
 - What reasonable expectations does the individual have about what will happen to their personal data?
 - What are the consequences of disclosure?
 - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
17. The HSE has said that individuals who are the subject of complaints have a reasonable expectation that information will be used for the purposes of that complaint only and will be treated confidentially. In the Commissioner's view this is especially true where the HSE has decided that no further action is required on a complaint, as was the case here.
18. The Commissioner is aware that the complainant is in dispute with the individual he complained to the HSE about and that he is pursuing his grievances through the courts. In this context the Commissioner considers that disclosure would be distressing to the individual concerned. Furthermore, the Commissioner notes that the individual has explicitly refused his consent to disclose his personal data following the complainant's request.

19. However, the Commissioner has also taken into account any legitimate interests in disclosure because it is his approach that notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to disclose personal data if there is a public interest in disclosure.
20. The complainant clearly feels that the individual who is the subject of his complaint to the HSE is somehow guilty of wrongdoing and that disclosure is necessary for him to achieve justice. However, the Commissioner is obviously in no position to determine whether there was any wrongdoing in this case. That is a matter for the courts and the appropriate regulator. In the Commissioner's view there is no wider public interest in disclosure and any public interest there may be in providing the information to the complainant is outweighed by the public interest in protecting the rights and freedoms of the data subject.
21. Finally, the Commissioner would stress that whilst the name of the individual is obviously known to the complainant it is important to remember that disclosure under FOIA is disclosure to the world at large. Therefore, when applying the section 40 exemption the HSE and the Commissioner must consider the consequences of placing the information in the public domain where it is potentially available to anyone and not just the person making the request.
22. The Commissioner is satisfied disclosure of the withheld information would be unfair and would contravene the first data protection principle. Consequently, he finds that the section 40(2) exemption is engaged. As the Commissioner has found that all of the withheld information is exempt on the basis of section 40(2) he has not gone on to consider whether the section 41 exemption also applies.

Right of appeal

23. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. 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.
25. 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

Paul Warbrick
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF