

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2017

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 from the Health and Safety Executive (HSE) about its Band 3 Inspectors. The HSE has refused to disclose the information under section 40(2) of the FOIA as it says it is the personal data of third persons.
2. The Commissioner's decision is that the HSE is correct to withhold the requested information under section 40(2) of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 8 July 2016, the complainant wrote to the HSE and requested information in the following terms:

"Anonymised data for individual band 3 inspectors including:

Time on risk

Number of inspections undertaken in 2015/16 work year

% of those inspections which resulted in FFI

Number of complaint cases assigned in 2015/16 work year

Number of riddor investigation cases assigned in 2015/16

Number of prosecution cases approved in 2015/16 work year

*Number of notices served in 2015/16 work year
And within that data which performances (anonymised) were
categorised as exceeded and met in the division validation meeting"*

5. The HSE responded on 28 July 2016. It said that the information the complainant has requested is the personal data of third persons and exempt from disclosure under section 40(2) of the FOIA.
6. Following an internal review the HSE wrote to the complainant on 2 September 2016. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 5 September 2016 to complain about the way her request for information had been handled.
8. The Commissioner's investigation has focussed on whether the HSE has correctly applied section 40(2) of the FOIA to the information it is withholding.

Reasons for decision

Section 40(2) – third person personal data

9. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the requester, and the conditions under either section 40(3) or 40(4) are also satisfied.
10. The Commissioner has first considered whether, despite being anonymized, the requested information can be categorised as personal data.

Is the information personal data?

11. HSE has provided the Commissioner with the information it is withholding (although individuals' names are not given) and she has reviewed it. The information concerns a range of HSE Band 3 Inspectors' work activities as detailed in the request, and, in addition, each unnamed Inspector's end of year performance mark: 'Met' or 'Exceeded'.
12. The Data Protection Act (DPA) says that for data to constitute personal data, it must relate to a living individual and that individual must be identifiable.

13. Information can be said to 'relate to' an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
14. The Commissioner is satisfied that the requested information does relate to particular individuals as it concerns their performance in their jobs and is used to inform decisions affecting them (their annual performance mark and the resulting pay award).
15. The Commissioner has next considered whether these individuals can be identified from the information – even if it is anonymized, ie without individual Inspectors' names being given.
16. In its submission to the Commissioner, the HSE says that, although it recognizes that the FOIA is applicant and purpose 'blind', in this instance it is of the view that the complainant's identity should be taken into account. This is because, as it noted in its internal review response, the complainant is an HSE employee and, as such, has access to corporate information as part of her role within the organisation that would allow her to link all the anonymized work activity data she has requested to named individuals. This, in turn, will identify the performance mark awarded to named Band 3 Inspectors within the HSE's Central Division.
17. This is an example of the 'mosaic argument'. The term 'mosaic argument' is often used to refer to the argument that whilst it may not be prejudicial to disclose requested information in isolation, it would be prejudicial where the requested information can be combined with other information already in the public domain or already known to the requester.
18. In addition, the 'motivated intruder' test appears to have some relevance here. The 'motivated intruder' test involves considering whether someone without any prior knowledge would be able to identify individuals through anonymized information, if motivated to attempt this. Such an individual might, for example, carry out a web search, search archives or use social networking in order to identify an individual from whose personal data, anonymized data has been derived. An individual might also be in a position to search related records held by their employer.
19. Since release under the FOIA is release to the wider world, it is also true that, potentially, HSE employees other than the complainant would also have access to additional corporate information that would, if they were motivated to do so, enable them to identify particular Inspectors and their performance marks, even if the anonymized information the complainant has requested was released.

20. The HSE has confirmed to the Commissioner that the additional corporate information that would enable Inspectors to be identified is its COIN database. It says that this system logs all of the operational activity that HSE Inspectors undertake and specifies the work assigned to them personally: the number of inspections, concerns etc. HSE says this particular information is not 'secret' and any HSE employee who has access to COIN, around 2000 in total, could quite easily establish the work activity assigned against a named Inspector by simply cross referencing their work activity ie number of inspections, concerns etc against the team they work for.
21. With regard to Inspectors' performance marks being identified, the HSE says there are, for example, five Inspectors working in Group 10 in its Field Operation Directorate's Central Division. All of them have unique work activities assigned to them but when cross referenced against the team they work for, it would be possible to identify the work allocated to each of the five Inspectors. If the information the complainant has requested was released, it would then be possible to establish the end of year mark awarded to those named Inspectors.
22. Having considered the HSE's submission, the Commissioner is satisfied that the requested information, despite being anonymized, could lead to HSE Inspectors and their annual performance mark being identified. She is therefore satisfied that this information can be categorised as their personal data. The Commissioner has gone on to consider whether any of the conditions under section 40(3) or 40(4) of the FOIA have been satisfied.

Is a condition under section 40(3) or 40(4) satisfied?
23. Section 40(3)(a) says that personal data is exempt from release if disclosing it would contravene any of the data protection principles, or would cause damage or distress and so breach section 10 of the DPA.
24. The HSE's position is that releasing the requested information would contravene the first data protection principle as it would not be lawful or fair to the individuals concerned.
25. In assessing fairness, the Commissioner has considered whether the information relates to the data subjects' (ie the Band 3 Inspectors') public or private life; whether the data subjects have consented to their personal data being released and the data subjects' reasonable expectations about what will happen to their personal data.
26. The HSE has confirmed that the requested information relates to the Inspectors' public life. It has not consulted the Inspectors to ask if they consent to their personal data being released.

27. Regarding the Inspectors' reasonable expectations however, the HSE has told the Commissioner that the performance mark awarded to each of its Band 3 Inspectors is a confidential matter involving the employee and their line manager and it would not be disclosed to other employees within the organisation.
28. The performance marks are awarded to each employee during a private discussion with their line manager at the end of each reporting year. The HSE considers that its employees would have a reasonable expectation that this information will remain confidential and will not be shared with others within the business or placed into the public domain.
29. The complainant disputes that end of year performance marks are a confidential matter between the employee and their line manager, because these marks are given to the employee at a validation panel. The Commissioner considers that the marks are confidential in the sense that they not published widely across the organisation but are known only to specific staff members.
30. The Commissioner therefore agrees with the HSE that disclosing the requested information would be unfair to the Inspectors concerned. Band 3 Inspectors do not have a level of seniority that would perhaps justify the release of this information. The Commissioner also considers that the Inspectors would reasonably expect their personal data; that is their annual performance mark, would not be released to the world at large and that it would cause at least some of them a degree of damage or distress if this information were to be released.
31. Despite the factors above, the requested information may still be disclosed if there is compelling public interest in doing so that would outweigh the legitimate interests of the data subjects.
32. The complainant has told the Commissioner that the HSE runs a Fee For Intervention (FFI) scheme and Inspectors are required to recover the costs of their work if they come across a material breach (of the Health and Safety at Work Act) when inspecting or investigating a case. She is concerned that some Inspectors are not appropriately awarded at their end of year performance reviews because they have not done enough chargeable work.
33. The complainant does not consider it appropriate that HSE's Inspectors should feel pressured to meet notional FFI 'targets'. She says that it would be in the public interest for Inspectors to be rewarded on the basis of how much work they do, and the quality of that work, rather than on how much cost they recover. The complainant considers that releasing the information she has requested is therefore in the public interest as it would indicate whether the HSE's performance

management system is rewarding Inspectors on their charging and nothing else.

34. The Commissioner appreciates that this may well be the extent of the complainant's interest and that she has no interest at all in identifying which specific Inspector has been awarded what performance mark. However, release under the FOIA is release to the wider world, and other people may be motivated to do this.
35. The Commissioner also appreciates that the requested information is of interest to the complainant and that her associated concerns are not unreasonable. However, the Commissioner is not aware of any serious concerns about systemic failings in the way the HSE's Inspectors carry out their work, which put employees and the public at risk, and in which the way they are performance managed is a contributory factor. She therefore does not consider that the requested information is of such wider public interest that it outweighs the legitimate rights and freedoms of the data subjects ie HSE's Band 3 Inspectors.
36. The Commissioner is therefore satisfied that the HSE is correct to withhold the information the complainant has requested under section 40(2). It is the personal data of third persons and a condition under section 40(3) is satisfied because releasing it would breach the first data protection principle. Since a condition under section 40(3) has been met, it has not been necessary to consider the condition under section 40(4).

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@hmcts.gsi.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
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