

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

Decision notice

Date: 2 May 2018

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the internal investigation report carried out by Total into the blowout at the Elgin 4 Well Head in 2012.
2. The Commissioner's decision is that the Health & Safety Executive ("the HSE") does not hold any further information within the scope of the request. However, in failing to notify the complainant within 20 working days that it required further time to consider the request, it breached Regulation 7(3) of the Environmental Information Regulations ("the EIR").
3. The Commissioner does not require the HSE to take any further steps

Background

4. On the 25th March 2012, a blowout occurred on the Offshore Elgin Well Head Platform operated by Total UK Ltd ("Total") resulting in the release of several tonnes of highly pressurized flammable gas. It took 51 days for the well head to come under control and during that time more than 6172 tonnes of gas were released.

5. The Health and Safety Executive (HSE) is the statutory body responsible for the regulation and enforcement of workplace health, safety and welfare within the UK and its statutory powers and responsibilities are derived from the Health and Safety at Work etc. Act 1974 (HSWA) and associated relevant statutory provisions. Section 20 – 23 of the HSWA and associated legislation provides HSE Inspectors with powers of entry to work places, powers to investigate incidents and powers to take enforcement action, including prosecution, against those responsible for offences under the HSWA and associated legislation.
6. Following the blowout HSE commenced an investigation of the incident gathering information from those involved with a view to understanding the cause and establishing whether there were grounds for enforcement action, including prosecution. In December 2015, HSE successfully prosecuted Total for breaching health and safety legislation and the company was fined £1.125 million.
7. On 25 September 2014, whilst the investigation was active, the complainant requested "*facts in the possession of the HSE, that describe the events of the Elgin blowout? I'm referring here to the facts that were both uncovered by your two year long investigation, and by Total in their in house investigation, and passed on to you.*" The HSE refused the request and the refusal was upheld by the Commissioner.¹

Request and response

8. On 15 August 2017, the complainant, referring to his 2014 request, requested information of the following description:

"Would you please release to me, under foi rules, Total's report of their internal investigation into the Elgin blowout.

"Though you confirmed that you held the document, my original request (2014090369) was turned down as was my request for a review of this decision (2014110080). The grounds given were that, 'the report relates to HSE's investigation of this incident and a potential prosecution'. Presumably these objections no longer apply."

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043633/fs_50566409.pdf

9. On 15 September 2017, the HSE wrote to the complainant to say that they needed to extend the time period for responding to his request "by a further 40 days" due to the "complexity/volume of your request."
10. On 22 September 2017, the HSE issued its substantive response. It provided some information and stated that it held no other information within the scope of the request.
11. The complainant formally requested an internal review on 29 September. He stated that the information which the HSE provided was not the "Internal Investigation Report" that he requested and he supplied what he believed to be the title of that report.
12. The HSE provided the outcome of its review on 22 November 2017 in which it stated that it did not hold a copy of the report that the complainant had requested.

Scope of the case

13. The complainant contacted the Commissioner on 30 November 2017 to complain about the way his request for information had been handled.
14. The Commissioner considers that the scope of her investigation is to establish whether the HSE holds (or held at the time of the request) a copy of Total's internal investigation report.

Reasons for decision

Is the requested information environmental?

15. Regulation 2(1) of the EIR defines environmental information as being information 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);*
16. The Commissioner's view is that an internal investigation report into a major blowout relates to an emission (of flammable gasses) "affecting or

likely to affect the elements of the environment" and therefore the HSE was correct to handle the request under the EIR.

Procedural Matters

17. Regulation 5(1) states that:

"A public authority that holds environmental information shall make it available on request"

18. Regulation 5(2) states that requests for environmental information should be responded to *"as soon as possible and no later than 20 working days after the date of receipt of the request."*

19. Regulation 7 states that:

(1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days...to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

(3) Where paragraph (1) applies the public authority shall notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request.

20. As the HSE did not inform the complainant, within 20 working days, that it needed further time to consider his request, it has therefore breached Regulation 7(3) of the EIR.

Was the requested information held?

21. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

22. The Commissioner has satisfied herself that the HSE has conducted relevant and appropriate searches of its records to determine whether it holds a copy of the report. This has involved the HSE searching its records management software, its paper files and also consulting the case officers involved in investigating the Elgin incident.

23. The Commissioner also requested a copy of the evidence log passed to the Crown Office and Procurator Fiscal Service (COPFS).

The Complainant's position

24. The complainant contends that the HSE must hold a copy of Total's own internal investigation report. He notes that the blowout caused a substantial release of flammable gas and he is concerned that, if lessons are not properly learned from this incident, the lives of workers on the North Sea oil and gas fields could be in danger.
25. The information which the HSE disclosed to the complainant took the form of slides from a powerpoint presentation which was given, by Total, to the HSE on 27 February 2013. The presentation contains only 4 slides which relate to the incident itself and the lessons learned. The remaining slides detail Total's general operating, monitoring and emergency procedures.
26. The complainant contends that the HSE could not possibly have carried out a thorough investigation into the Elgin blowout without having asked Total for detailed submissions on what had happened. He believes that the powerpoint slides he was provided with do not provide the level of detail necessary to satisfy the requirements of a thorough investigation and sound recommendations. In correspondence with the Commissioner, he asked "*What information other than that provided by Total, could the HSE have used as a basis for their own investigation?*"
27. The complainant further notes that the slides contained a thumbnail image purporting to be the front page of the report he is seeking.

The HSE's position

28. The HSE's position is that it does not and never has possessed, a copy of the report the complainant is seeking.
29. The HSE has noted that it has wide-ranging powers to compel organisations to provide evidence required in the course of an investigation. It says that it does not take a prescriptive approach to the documentary evidence it collects in each case. The investigating officers will ask for any documents they feel are necessary to investigate an incident and, if necessary, initiate a prosecution.
30. The HSE is aware of the thumbnail image in the powerpoint slides. As the slides were not created by the HSE, it has said that it cannot be certain as to whether the thumbnail is of the report in question or not.
31. Whilst the HSE has said that it cannot, given the passage of time, be definitive as to why it did not request the report, it has provided the Commissioner with two explanations as to why this may not have happened:

- a. As the report had been written by Total (and would therefore not have been independent) it would have added little to the HSE investigation beyond the considerable amount of raw information that had already been provided.
 - b. Any such report may have formed part of Total's defence against prosecution and, as such, Total would not have been under any obligation to share it with the HSE.
32. The HSE has stated that, whilst it did withhold information from the complainant during the course of the prosecution, it is no longer withholding information from him and that it would not be in the HSE's interests to do so.
33. During the course of her engagement with the HSE, the Commissioner sought clarification that the powerpoint presentation was the information that was withheld from the complainant in 2014. The HSE has confirmed that the document is the same – albeit it was referred to then as the “internal investigation report.”

The Commissioner's view

34. The Commissioner has satisfied herself that the HSE's searches would have located the report if it were held.
35. She has also satisfied herself that neither the title of the report nor any other similar document appears on the extensive log of evidence passed to COPFS by the HSE.
36. The Commissioner considers both of the HSE's explanations, as to why it does not hold the report, to be plausible. She also considers the fact that the report does not appear on the evidence log lends credence to both of these arguments.
37. The complainant may be correct to suggest that the slides he has been provided with would not be sufficient basis for a prosecution – but they only represent a fraction of the information that was collected by the HSE. Of far more use would have been the statements from witnesses, statements from independent experts and the monitoring data which the Commissioner has seen listed in the evidence log passed to COPFS.
38. A report will generally include a blend of raw data and analysis of that data carried out by the report's author(s). In the case of this particular report, the analysis would have been created by Total.
39. The HSE's argument at (31)(a) above is that, as it already had access to the raw data which would have underpinned the report (ie. the witness statements, monitoring data and incident logs provided to the HSE), the only *additional* information that the report would have provided would

have been Total's *analysis* of that raw data. Therefore, the HSE argues, the report would have added nothing to the investigation.

40. The complainant is strongly of the belief, based on the wording of responses that were sent to him at the time, that the HSE held a copy of the report in 2014. It is perhaps regrettable that the HSE was not clearer about the format of the information it did hold and the Commissioner considers that this may have led to the complainant mistakenly believing that different information was held.
41. Notwithstanding that, having carried out a thorough and rigorous investigation, the Commissioner has satisfied herself, on the balance of probabilities, that the HSE does not hold the requested information.

Right of appeal

42. 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

43. 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.
44. 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

Ben Tomes
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