

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2023

Public Authority: Health and Safety Executive
Address: 1.3 Redgrave Court
Bootle, Merseyside, L20 7HS

Decision (including any steps ordered)

1. The complainant has requested HSE to disclose information relating to the contravention notices a named Inspector has issued for the year ending 31 December 2022. HSE disclosed some information, confirmed one element is not held and refused to disclose the remainder citing section 30(1)(b) of FOIA.
2. The Commissioner's decision is that HSE is entitled to rely on section 30(1)(b) of FOIA for question nine of the request. However, he does not consider section 30(1)(b) applies to questions two, three, four and five of the request.
3. The Commissioner requires HSE to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information for questions two, three, four and five of the complainant's request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 February 2023, the complainant wrote to HSE and requested information in the following terms:

"1.A note of the number of notices of contravention sent by your [named redacted], HM Inspector of Health and Safety, during the year ended 31 December 2022.

2.A note of the number of notices of contravention sent by your [name redacted], HM Inspector of Health and Safety, during the year ended 31 December 2022 which stated that in order to gain HSE approval to carry out construction work the person to whom the notice was sent must appoint a principal contractor who must be approved by the Inspector ([name redacted]).

3.A note of the number of notices of contravention sent by your [name redacted], HM Inspector of Health and Safety, during the year ended 31 December 2022 which stated that in order to gain HSE approval to carry out construction work the person to whom the notice was sent must provide a construction phase plan for approval.

4.A note of the number of notices of contravention sent by your [name redacted], HM Inspector of Health and Safety, during the year ended 31 December 2022 which stated that in order to gain HSE approval to carry out construction work the person to whom the notice was sent must provide a remedial action plan, drawn up by a competent person, to the Inspector ([name redacted]) for approval.

5. A note of the number of notices of contravention sent by your [name redacted], HM Inspector of Health and Safety, during the year ended 31 December 2022 which stated that: "construction work must not be carried out at this site until I ([name redacted]) am satisfied that Health and Safety Laws, particularly the CDM Regulations 2015, are being complied with."

6.A note of the number of notices of contravention sent by your [name redacted], HM Inspector of Health and Safety, during the year ended 31 December 2022 which accompanied or followed the issue of a Prohibition Notice.

7.A note of the number of notices of contravention sent by your [name redacted], HM Inspector of Health and Safety, during the year ended 31 December 2022 which accompanied or followed the issue of an Improvement Notice.

8. A note of the number of complaints made to HSE during the year the year ended 31 December 2022 which raised issues of breaches of the Human Rights Act.
9. Copies of all notices of contravention of Health and Safety at work etc Act 1974 sent by your [name redacted], HM Inspector of Health and Safety, during the year ended 31 December 2022.”
6. HSE responded on 9 March 2023. It disclosed the information for questions one, six and seven and confirmed that it does not hold the information for question eight. For the remaining questions it refused to disclose the information citing section 30(1)(b) of FOIA.
7. Following an internal review HSE wrote to the complainant on 28 June 2023. It upheld its previous position.

Scope of the case

8. The complainant contacted the Commissioner on 27 June 2023 to complain about the way their request for information had been handled. They stated that HSE has issued a contravention notice, which they believe is in breach of the Human Rights Act 1998. The purpose of their information request is to see how many other contravention notices have been issued by a named Inspector in similar terms. They believe the remaining withheld information should be disclosed, as it is of public interest.
9. The Commissioner considers that the scope of his investigation is to determine whether or not HSE is entitled to rely on section 30(1)(b) of FOIA for questions two, three, four, five and nine of the request.

Reasons for decision

Section 30 – investigations and proceedings

10. Section 30(1)(b) of FOIA states that information is exempt from disclosure if it has at any time been held by the public authority for the purposes of any investigation which it has conducted and, in the circumstances, may lead to a decision by the authority to institute criminal proceedings which the authority has the power to conduct.
11. It is a qualified exemption. It is therefore subject to the public interest test.

12. HSE confirmed that in June 2022 it received a concern from a member of the public associated with construction works being undertaken at their neighbouring property. The property in question is owned by the complainant and their partner. The concern raised met HSE's incident selection criteria and in light of this an Inspector visited the property. During the visit the Inspector identified several contraventions of health and safety law and also identified an activity being undertaken that involved a risk of serious person injury. The Inspector served the complainant's partner with a Prohibition Notice requiring work on the site with immediate effect and a Notice of Contravention letter was sent to them.
13. HSE advised that the complainant and their partner have been in dispute since its intervention and appealed the serving of the Prohibition Notice, costs associated with its Fee For Intervention at their property and have made complaints associated with the capability of the Inspector concerned. It confirmed that all these matters have been addressed via the published appeals channels. In addition to this, the complainant, their partner and an unknown third party have initiated numerous FOIA requests to HSE and subject access requests.
14. HSE confirmed that it has powers under sections 20 to 23 of the Health and Safety at Work etc Act 1974 (HSWA) and associated legislation to enter work places, investigate incidents and taken enforcement action, including prosecution, against those responsible for offences under the HSWA and associated legislation. The enforcement options used when investigating health and safety concerns vary and include the provision of advice and information, the service of notices, the withdrawal of licenses and/or approvals and prosecution. It said that regardless of the level of intervention, all the information it acquires or creates as part of this process is held for the purposes of investigating if there has been a breach of health and safety legislation, with a view to it potentially being used to institute criminal proceedings against the party being investigated. The withheld information therefore falls squarely within section 30(1)(b) of FOIA.
15. HSE explained that a NOC is either a templated form served at the conclusion of a visit or a letter prepared post visit and sent by post or email, detailing the legislation the Inspector considers has been broken, the reasons for their opinion and what actions are required. It may stand alone or be accompanied by an Improvement Notice and/or Prohibition Notice. These notices are generally served at the conclusion of a visit and in a template format.
16. A Prohibition Notice is served under section 22 of the HSWA by the Inspector, if they are of the opinion that an activity being undertaken, or likely to be undertaken, involves or will involve a risk of serious personal

injury. The notice will state the opinion of the Inspector, specify the matters which give or will give rise to risk, direct that the activity should not be carried on unless the matters giving rise to the Inspector's opinion have been remedied.

17. It said that HSE's interventions with dutyholders can vary greatly and may not lead to a full investigation. Service of a NOC may not lead to a full investigation if the Inspector is satisfied that the dutyholder has complied with all aspects of the NOC.
18. Improvement and Prohibition Notices are published 6 weeks after they are served to allow for the appeals period and notices that are under appeal or withdrawn are not published. Those that are published remain on the register for a period of 5 years.
19. HSE clarified how NOC's are not proactively published because they routinely contain a substantial amount of information over and above that which appears within the public enforcement register following the service of a notice. A NOC will routinely contain material breach(es) identified but will include much greater detail associated with the findings of the Inspector during their visit, details of third parties spoken to during the visit and may also contain photographs taken during a visit. The NOC may also contain other information not related to the material breach(es) identified that day.
20. Section 30(1)(b) of FOIA is a classed based exemption. The withheld information need only fall within the definition of the exemption for it to apply. The Commissioner is satisfied that HSE has the powers to conduct investigations under sections 20 to 23 of the HSWA and these investigations are conducted in circumstances which may lead HSE to instigate criminal proceedings for any breaches of the legislation that are not remedied as a result of its enforcement measures. The withheld information is information held by HSE for the purposes of those investigations and is therefore covered by section 30(1)(b) of FOIA.

Public interest test

21. HSE advised that it considered the public interest in transparency and accountability. However, it considers these factors are already met by its decision to proactively publish details of notices and prosecutions. It believes such proactive publication provides the public with details of the decisions it takes when breaches of health and safety legislation have been identified and successfully engaged.
22. It said that although it does not proactively publish NOC's, information detailed within them is shared with the relevant parties (employees, trade union representatives and with representatives of employee

safety), thereby meeting the public interest in transparency and accountability.

23. HSE considers the public interest rests in maintaining the exemption. It said that as the statutory regulator and enforcer of health and safety legislation in the UK, it gathers a wide range of information from those under investigation. It investigates accidents, incidents, cases of ill health and concerns (complaints raised by workers or members of the public). The level of information acquired during an intervention can vary significantly and can range from company policies and procedures to witness statements, equipment test results and risk assessments. Information can be acquired from those under investigation and from third parties who may not be under investigation but may be in a position to support HSE's investigation by providing technical expertise. HSE will also create information in the form of formal letters, emails communications, investigation/specialist reports and in the event of a prosecution court bundles.
24. It commented that all information is created or acquired to determine causes, share lessons and identify what actions a dutyholder needs to take to prevent reoccurrence. Intervention provides the basis for enforcement action to prevent harm, to secure sustained improvement in the management of health and safety risks and to hold those who fail to meet their obligations to account. Enforcement also provides a strong deterrent against those businesses who fail to meet these obligations.
25. HSE advised that whilst the HSWA and associated regulations provide its Inspectors with powers to compel those under investigation to provide information during the course of an intervention, it is HSE's preference as a regulator to work with those under investigation to secure information on a voluntary basis. This style of enforcement provides HSE with a much greater level of information than it would acquire if it engaged its regulatory powers to mandate the provision of information. In addition, compelled information cannot be reliably used to support the prosecution process, should this course of action be required.
26. In light of this, HSE is of the view that the routine disclosure of NOC's into the public domain would discourage those under investigation now and in the future from sharing information with HSE for fear any information they share being disclosed to the world at large. It is of the opinion that this would not ultimately serve the overall public interest because it would be likely to impact on its ability to bring about successful enforcement action, including prosecution, should this course of action be determined.
27. It notes that on occasions it will support the overall public interest to disclose its investigation material (examples given are its investigation

into the Smiler Ride incident at Alton Towers or its investigation of the Gorse Park Explosion in Ayr, Scotland) but it does not consider this is relevant in this case.

28. The Commissioner considers the balance of the public interest is different for questions 2 to 5 than it is for question 9, based on the submissions he has received from HSE.
29. For all questions, the Commissioner acknowledges the public interest in transparency and accountability and in members of the public understanding more closely where enforcement action has been required and what HSE has done to remedy the breaches it has identified.
30. He agrees with HSE that the proactive publication of Improvement and Prohibition Notices and prosecutions goes a considerable way to meeting those public interest factors.
31. However, for questions 2 to 5 of the request the Commissioner does not see how the disclosure of the number of NOC's which state a particular course action would be likely to have the effects HSE has described on the voluntary supply of information, co-operation of dutyholders and others and therefore its ability to conduct its investigations effectively. These questions ask for the number of notices which state a particular remedial requirement. One would expect remedial requirements of the nature specified in these questions to have been put forward by the relevant Inspector to ensure that the breaches identified are remedied. The Commissioner cannot see how disclosure of this information could be connected to particular cases and disagrees that it is information HSE has acquired from relevant parties as part of the process.
32. No specific public interests arguments in support of the exemption for these questions and information asked for within them have been put forward by HSE. HSE's arguments have focused on the information it acquires and creates as part of its enforcement process and the information parties shared freely and voluntarily to aid that process, which are more fitting to question 9 of the request.
33. For the reasons, the Commissioner does not agree that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. He therefore considers this information should be disclosed.
34. In respect of question 9 (which asked for copies of NOC's issued), HSE has explained how NOC's contain much more detailed information to the Prohibition and Improvement Notices that may accompany them. They will address the breaches in more detail, why the Inspector has reached the opinion that they have and discuss information HSE has gathered

from relevant sources, as part of its enforcement action. The Commissioner accepts that disclosure of this information would be likely to hinder HSE's ability to conduct such enquiries in the manner it is doing forward. If dutyholders or those who assisted HSE's enquiries feared that the information they volunteered could be disclosed to the world at large, they would be more reluctant to assist and supply the information HSE needs voluntarily. This would then mean that HSE would have to use its more formal powers to gain the information it needs and this would not be in the wider interests of the public. It would take more time and resource and HSE has stated that compelled information is less reliable if prosecution is required.

35. For question 9, the Commissioner considers the public interest rests in maintaining HSE's ability to investigate breaches of legislation as it currently does and this heavily relies on the co-operation of all relevant parties. For these reasons, for this element of the request, he has decided that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

36. 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

37. 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.
38. 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

Samantha Coward
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