

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

Decision notice

Date: 25 November 2020

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

Decision (including any steps ordered)

1. The complainant has requested communications, documents, photographs and other information relating to the removal of asbestos at a demolition site. The Health and Safety Executive (HSE) refused to provide the information it held under the exception at regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that the regulation 12(5)(b) exception is engaged but the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information within the scope of the request, with appropriate redactions under section 40(2) for any personal data.
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 29 July 2019 the complainant made a request to the Health and Safety Executive (HSE) in the following terms:

"I request the following information in relation to the finding of confirmed, disseminated asbestos in the environment in relation to the recent demolition site of Craigends Farm house and Steading near [address redacted].

1) Please provide copies of all communications whether verbal, electronic, photographic or in hard copy format between HSE and the Craigends property owners, Community Windpower Ltd, Godscroft House, Godscroft Lane, Frodsham, Cheshire, WA6 6XU, or their subsidiary company Sneddon Law wind company Ltd, Calendonian Exchange, 19A Canning St, Edinburgh EH3 8HE, in relation to demolition of Craigends property, their contractors, the site clearance and/or the testing for and removal of asbestos, confirmed or suspected, on or around the site, between 1st August 2018 and 29th July 2019.

2) Please provide copies of all communications whether verbal, electronic, photographic or in hard copy format between any contractors or companies (whether limited or not) or with other workers employed in their demolition, site clearance and haulage of demolition rubble and asbestos waste on or from this site between 1st August 2018 and 29th July 2019. Specifically, this should include those communications with Barr Environmental Ltd, Hamilton Tarmac Ltd, John M Brown Agricultural contractor and James H Ireland agricultural contractors.

3) Please provide copies of all communications whether verbal, electronic, photographic or in hard copy format between HSE and SEPA (Scottish Environment Protection Agency) and East Ayrshire Council, between 1st August 2018 and 29th July 2019 in relation to demolition of the Craigends property, their contractors, site clearance and/or the testing for and removal of asbestos, confirmed or suspected, on or around the site, between 1st August 2018 and 29th July 2019.

4) Please provide copies of all communications whether verbal, electronic, photographic or in hard copy format, between HSE and members of the public between 1st August 2018 and 29th July 2019 in relation to demolition of the Craigends property. This must include reference to, or copy of those communications with or between the other organisations listed in 1 to 3 above. (This acknowledges that under GDPR 2018, personal identifying details will require to be redacted).

5) Please provide copies of all licences, completed ASB NNLW1 (Notification of non-licensed work with asbestos), risk assessments, any

test results and the inspection visit logs by HSE Officers or staff in relation to the Craigends site between 1st August 2018 and 29th July 2019.

6) Please provide evidence that HSE staff involved in this site had knowledge of and understanding of applying the statutory requirements of the 'Control of Asbestos Regulations 2012'."

6. HSE responded to the request on 31 July 2019 confirming that it held information falling within the scope of the request but refused to disclose this as it engaged the exception at regulation 12(5)(b) of the EIR on the basis that HSE were still in the middle of investigating a concern that had been raised. HSE informed the complainant the request could be kept on file until the investigation had concluded and advised the complainant to resubmit the request at a later date.
7. The complainant asked for an internal review on 1 September 2019. This followed confirmation from the HSE on 29 August 2019 that its investigation had concluded. The complainant therefore asked the HSE to reconsider its decision to refuse to disclose the requested information.
8. HSE responded on 5 September 2019 and upheld its decision.

Scope of the case

9. The complainant contacted the Commissioner on 7 September 2019 to complain about the response to her information request.
10. The Commissioner considers the scope of her investigation to be to determine if the HSE has correctly withheld the information it holds on the basis of regulation 12(5)(b) of the EIR.

Reasons for decision

11. Regulation 12(5)(b) provides an exception to the general duty to disclose environmental information where a disclosure would adversely affect –

"the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature."

12. The successful application of this exception is dependent on a public authority being able to demonstrate that the following three conditions are met:
 - The withheld information relates to one or more of the factors described in the exception;
 - Disclosure would have an adverse effect on or more of the factors cited; and
 - The public interest in maintaining the exception outweighs the public interest in disclosure.
13. The Commissioner's guidance on regulation 12(5)(b) sets out that there is no definitive list that covers circumstances when a public authority may wish to consider applying the exception. The Information Tribunal¹ commented that the 'course of justice' does not refer to a specific course of action but is *"a more generic concept somewhat akin to 'the smooth running of the wheels of justice'"*.
14. The HSE has not indicated it is applying this exception due to any legal privilege and does not consider any of the information attracts legal professional or litigation privilege. The HSE argues that disclosure of the information subject to this exception would have an adverse effect on its ability to conduct investigations.
15. The HSE is the statutory body for the regulation and enforcement of the Control of Asbestos Regulations 2012. In this case the primary focus of the HSEs investigation was to establish if there had been a breach of these Regulations.
16. The question for the Commissioner is whether disclosing the information to the public would adversely affect the course of justice. In this case with regard to the HSEs ability to conduct an inquiry. In considering this the Commissioner has also considered if the information can be considered on a blanket basis rather than in respect of each individual piece of information. It is only information obtained or created by the HSE in the course of their investigation that is being withheld, this information was obtained by third parties solely for the purpose of the investigation or created by HSE as part of its investigation and therefore the Commissioner is of the view that it can all be considered as a whole under this exception.

¹ *Rudd v IC & the Verderers of the New Forest (EA/2008/0020)*

17. The Commissioner's guidance on regulation 12(5)(b) states that the principle of an adverse effect on the course of justice is wide enough to cover any adverse effect on investigations and proceedings.
18. The Commissioner would accept the HSE has a duty to conduct investigations and proceedings under the Control of Asbestos Regulations so she must consider if the information requested would adversely affect the HSEs ability to conduct investigations if it were disclosed.
19. The HSE has confirmed its investigation is closed, and whilst it was open at the time of the request it concluded shortly afterwards and was closed by the time the internal review was conducted.
20. The HSE argues that should it have decided to instigate enforcement action or criminal proceedings against one or more of the duty holders involved in the investigation, all of the documents had the potential to be used as evidence to support breaches of health and safety legislation in either a Crown or Magistrates Court.
21. It was argued that disclosure would be likely to reduce the chance of HSE bringing a successful prosecution, if this course of action was deemed necessary, as the duty holder(s) would state they could not receive a fair trial because evidence of health and safety failures had been placed in the public domain ahead of a decision to prosecute. Disclosure would also reduce the chances of a successful prosecution, if this action was appropriate, as the Court would be unlikely to accept evidence HSE had previously disclosed into the public domain.
22. The HSE further argued that disclosure would be likely to impede the gathering of information and evidence in future investigations as those under investigation would be less willing to provide information voluntarily if they thought it would be placed into the public domain ahead of enforcement decisions. HSE acknowledges it can obtain information using its statutory powers but states that compelled information is not always admissible in court so HSE always tries to seek information from those under investigation voluntarily.
23. Following on from this, the HSE considers disclosure would be likely to inhibit HSEs ability to conduct further investigations effectively if third parties are less willing to volunteer information. The HSE states that thousands of health and safety concerns are raised with HSE each year and many of these concerns lead to a full investigation and, in some cases, prosecution. Where these concerns are raised by members of the public the HSE considers disclosing the concerns into the public domain could lose the public's trust to investigate their concerns in confidence.

24. In this case, the Commissioner has viewed the information that the HSE states is within the scope of the request and notes that the majority of it relates to the timeline of the investigation and some correspondence between parties on the inspection and removal of asbestos at the site.
25. The Commissioner has issued previous decision notices relating to the use of the regulation 12(5)(b) exception and has previously commented that "disclosure could hinder the authority's ability to find witnesses willing to participate in investigation, once they knew that their contributions could be disclosed. This could adversely affect the authority's ability to conduct investigations. (S)he also accepted that release of this information could reveal how the authority conducted investigations – awareness of its techniques could enable suspects to evade convictions."
26. Whilst the Commissioner appreciates that the investigation is now complete, she considers that there is merit in the argument that disclosure of the information would have an adverse effect upon the relationship between the HSE and third parties involved in an investigation. It is a well-established principle that the voluntary and candid supply of information within this context is preferable and that disclosure of information which damages the relationship between third parties and the HSE would therefore prejudice the HSE's investigatory powers.
27. Based upon the HSE's submissions that disclosure of the withheld information would adversely affect its ability to conduct an inquiry the Commissioner does consider that regulation 12(5)(b) EIR is engaged in relation to the withheld information. The Commissioner has therefore gone on to consider the public interest test in this case.

Public interest arguments in favour of disclosure

28. HSE has recognised there is a public interest in disclosing information which provides greater transparency and accountability of its processes and actions.
29. The complainant argues that the issues raised related to alleged serious environmental emissions and the potential for serious adverse public health effects and it was in the public interest for information on the investigation to be made public to address public concern.
30. The complainant stated that workers and the public had been potentially exposed to asbestos and that it had been confirmed that asbestos was present on the demolition site while workers were unknowingly clearing the rubble. The recognised potential for future harm and mortality from asbestos related disease to the wider public provides overwhelming

reason for serious and genuine public concern, which the complainant argued would be a compelling argument for disclosing information on the investigation to show that HSE has undertaken its duties properly to protect public health.

31. The complainant further argues that the public are entitled to know whether public authorities have complied with their statutory obligations, including understanding whether workers and the wider public were protected from harm which might have resulted from poor or unregulated working practices. It is a legal requirement that licensed and unlicensed contractors working with asbestos are identified, carry out work in a prescribed manner and keep records.
32. It is therefore in the public interest to understand that HSE complied with and applied its own guidance and legislative requirements. The complainant considers this should be public information and if actual harm is identified in the future the public interest is served by knowing whether that harm may have been caused by particular working practices or a specific contractor and to know that HSE holds the required records.

Public interest in maintaining the exception

33. The HSE, in its initial response, argued that disclosure would impede an ongoing investigation by hampering the gathering of information and evidence.
34. It considered that disclosure would inhibit the ability of the HSE to conduct further investigations effectively, for example third parties may be less willing to volunteer information to HSE if information was disclosed inappropriately.
35. HSE also argued that disclosure would reduce the chances of a successful prosecution should the investigation have concluded that a prosecution was necessary.
36. HSE overall considered that the public interest in withholding the information was substantial because of the adverse impact on the ability of HSE to conduct investigation and this investigation in particular.

Balance of the public interest arguments

37. In this case the Commissioner accepts that at the time of the request the investigation was still underway and no decision had been made as to whether further action would be needed. The Commissioner recognises that whilst investigations are underway there is a strong need to protect the investigatory process so as not to prejudice the outcome or any potential prosecution.

38. However the balance of the public interest test can be considered up to the time the internal review is carried out which was endorsed in Supreme Court in *R (Evans) v Attorney General* [2015] AC 1787 at paragraph 72. In this case the relevant date for considering the public interest test is therefore up to 5 September 2019 and the investigation concluded on 29 August 2019. As such any arguments relating to prejudice to the investigation itself cannot be considered to carry any weight in this case.
39. The only arguments that can be considered are those which relate to the impact of disclosure on future investigation. The Commissioner does accept that there may be some impact on the voluntary provision of information from third parties assisting in investigations and that this may impede investigations to a degree. The extent of this is not clear, HSE does have powers to compel third parties to provide information and whilst HSE has stated that information obtained in this way is not always permissible in court the Commissioner is again unclear how likely this scenario is. The arguments seem to be somewhat speculative and she is not minded to accept that members of the public will be reluctant to report health and safety concerns in the future as a result of disclosing the information in this case.
40. As the complainant has identified, there is a public interest in understanding that asbestos related complaints have been properly addressed and that any duty holder who has not complied with the relevant regulations or has not carried out proper removal has been given appropriate sanction, be this in the form of advice or prosecution. There is a public interest in knowing that HSE has records of duty holders who have been involved in asbestos removals that are the subject of concerns in order for the public to be able to scrutinise this.
41. In conclusion, at the time of the internal review the investigation had concluded and there was no prosecution that could have been prejudiced and the arguments about future inhibitions to investigations seem speculative. Given there is a recognised public interest in the subject matter and wider environmental issues and the fact that under the EIR there is a presumption in favour of disclosure, the Commissioner considers the public interest in maintaining the exemption is outweighed by the public interest in disclosure in this case.

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@justice.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

Jill Hulley
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