Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 March 2011

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

Summary

The complainant requested a copy of the public authority's report into an accident involving their client. Although some information was provided to the complainant under the Data Protection Act 1998 (the "DPA"), the public authority refused to provide some information on the grounds that it was exempt under section 30(1)(b) of the Freedom of Information Act 2000 (the "Act"). It also stated that it no longer held some emails that were referred to in documentation relating to its investigation into the accident. After investigating the case the Commissioner found that the withheld information was actually the personal data of the complainant's client. This information is therefore exempt from disclosure under the Act under section 40(1), and should instead be considered for disclosure under the DPA. In relation to the outstanding emails identified by the complainant, the Commissioner found that this information was not held by the public authority at the time of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant contacted the Health and Safety Executive (the "HSE") on 4 May 2010 and made the following request,

> *"Whilst we appreciate that no action was taken against* [named company] *we would nevertheless appreciate sight of any documentation completed by* [named company] *in respect of this accident including the riddor."*

3. By way of background, this request was made in relation to an investigation carried out by the HSE into an accident involving the client of the complainant in July 2009. The term 'riddor' refers to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995. This requires employers to report specified occupational injuries, diseases and dangerous occurrences to the appropriate enforcing body, such as the HSE.

4. The HSE responded in a letter dated 1 June 2010. It confirmed that it held some information that it believed was the personal data of the complainant's client, and this information was disclosed under the Data Protection Act 1998 (the "DPA"). In addition to this it also disclosed some information under the Act – namely,

- factual sections of its investigation report,
- a computer printout (the 'Cases Report') of relevant contacts, and
- a letter to the named company dated 13 January 2010.

It noted that these documents had been redacted, as it believed that this information contained the personal data of third parties, and was therefore exempt under section 40(2) of the Act. In addition to this, it added that the analysis section of its Investigation Report and one internal process paper had been withheld under section 30 of the Act. It also confirmed that it held further information which it had obtained from Greater Manchester Police ("GMP") – namely,

- copy of the relevant pages from Oldham CID Day Book,
- copy of diary entries, and
- 33 photographs.

It informed the complainant that this information was exempt from disclosure under section 30 of the Act. Finally, it also informed the

complainant that it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure.

5. The complainant wrote to the HSE on 2 June 2010 and stated,

> *"Although we can appreciate the factors you have taken into consideration in deciding not to disclose the papers from Greater Manchester Police, given the very very serious injuries suffered by* [the client], *we would request that you reconsider this decision and allow us full access to the documentation. It is absolutely vital that we have as much information as possible surrounding the circumstances of this mysterious incident.*
>
> *In addition, we note from the three page document entitled Cases Report on page 2 thereof that there is an entry dated 3 July 2009 which refers to an exchange of emails between* [the named company] *and* [named HSE employee] *dated 3, 7 and 8 July 2009. We should be grateful to receive copies of those emails."*

6. The HSE acknowledged receipt of this on 11 June 2010 and informed the complainant that it was dealing with this as a request for an internal review.

7. The HSE wrote to the complainant again on 10 August 2010 and informed him that it had now carried out an internal review. It noted that in the request for an internal review, the complainant had only referred to the information it had obtained from GMP being withheld under section 30 – and therefore it had only carried out an internal review in relation to this withheld information. After reviewing the file the HSE continued to rely upon section 30(1)(b) to withhold this information. Finally, in relation to the emails referred to by the complainant it stated that,

> *"HSE no longer hold* [sic] *the emails between* [the named company] *and* [named HSE employee] *dated 3rd, 7th and 8th July. This is because the emails were not saved into COIN, HSE's electronic database, and our email system Outlook automatically deletes emails from an inbox after 90 days."*

The Investigation

Scope of the case

8. On 25 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically referred to the information that the HSE

had obtained from GMP, and the emails between the named company and the named HSE employee dated 3, 7 and 8 July 2009.

Chronology

9. The Commissioner wrote to the complainant on 20 January 2011 to inform him that the case was now under investigation. He noted that the complaint seemed to focus on two issues – namely the HSE's use of section 30(1)(b) to withhold the information that it had received from GMP, and the HSE's statement that it no longer held copies of the emails dated 3, 7 and 8 July 2009. Therefore these two issues would form the focus of this case.

10. On the same day the Commissioner wrote to the HSE and asked for a copy of the withheld information. In relation to the information it had received from GMP he noted that it may be the personal data of the complainant's client – although he was unable to reach a definitive view at that time until he had viewed the withheld information. However, he asked the HSE for its views on whether this information was, in fact, the personal data of the complainant's client. He also asked it to provide submissions to support its use of section 30(1)(b). Finally, in relation to the emails dated 3, 7 and 8 July 2009, he asked it to provide further details as to why it no longer held this information. In particular, he asked for further details of its retention policy in relation to information of this kind, together with details of the searches it had carried out in order to attempt to locate or retrieve this information.

11. The HSE responded on 21 February 2011 and provided the Commissioner with a copy of the withheld information. In relation to his questions about the withheld information, the HSE accepted that some of it did constitute the personal data of the complainant's client, although it added that it also contained the personal data of third parties. Therefore, it did not believe that this information could be released to the complainant under the DPA. It also provided further submissions to support its use of section 30(1)(b) in relation to this information. Finally, it provided further submissions in response to the Commissioner's questions about the emails dated 3, 7 and 8 July 2009.

Analysis

Substantive Procedural Matters

Section 1 – Are the emails held?

12. Section 1(1) of the Act states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

The full text of section 1 can be found in the Legal Annex at the end of this Notice.

13. In this case the Commissioner has had to consider whether the HSE still holds copies of the emails dated 3, 7 and 8 July 2009. These have been referred to by both the HSE and the complainant as an exchange of emails between the named company and a named HSE employee. It is the HSE's position that although relevant emails from these dates were (at one time) held, these emails were no longer held by the time of the request. The complainant has disputed this. Therefore the Commissioner has to decide whether the HSE has complied with section 1(1)(a) of the Act by stating that it did not hold this information at the time of the request.

14. In approaching cases such as this, where the fundamental question is whether a public authority holds requested information, the Commissioner is guided by the views of the Tribunal in *Bromley & others v ICO & Environment Agency* [EA/2006/0072], which stated that in cases such as this,

"The standard of proof to be applied in that process is the normal civil standard, namely the balance of probabilities…"[1]

15. Further to this, the Tribunal also went on to state that,

"…there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere with a public authority…"[2]

16. In reaching a view on the balance of probabilities the Commissioner should take into account a number of factors, including evidence of the scope and quality of the searches carried out by the HSE. The Commissioner has also noted the views of the Tribunal in *Fowler v ICO &*

[1] EA/2006/0072, para 10.

[2] EA/2006/0072, para 13.

Brighton and Hove City Council [EA/2006/0071] which suggested that such evidence may include,

> *"…evidence of a search for the information which had proved unsuccessful: or some other explanation for why the information is not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place..."*[3]

17. Therefore the Commissioner has considered whether, on the balance of probabilities, the HSE holds any relevant emails. In doing so he has particularly borne in mind any explanation as to why the specified information is not held.

18. The Commissioner has first considered the nature of the emails in question. As noted above, both the complainant and the HSE (in the internal review) have referred to them as an exchange of emails between the named company and a named HSE employee. However, in its letter to the Commissioner dated 21 February 2011 the HSE clarified that these emails were, in actual fact, internal emails between the HSE employee – who was the HSE inspector for the investigation into the accident that lies behind this case – and her predecessor.

19. The Commissioner is aware that this contradicts the HSE's previous description of these emails as being between itself and the named company. However he notes that they were first referred to in this way by the complainant. He also notes that the HSE has confirmed that it has spoken to the named employee, who has confirmed that these emails were, in fact, internal emails. In addition to this, he has also considered the Cases Report – where these emails were referred to. He has noted that in the Cases Report these emails are <u>not</u> referred to as emails between the HSE and the named company. Instead, the relevant part of the Cases Report states,

> *"Further enquiries to be made by* [named HSE employee]*, hence this case allocated to her (as requested by* [the principal investigator]*). Exchange of emails dated 3, 7 and 8 July with* [named HSE employee] *gives background to the incident."*

20. Whilst the Commissioner accepts that this entry can interpreted in more than one way, and that without being able to view these emails it is impossible to be 100% sure, he finds the public authority's explanation that these emails were internal, satisfactory and compatible with the entry from the Cases Report quoted above. Taking this into account, and bearing in mind the explanation provided by the named HSE employee,

[3] EA/2006/0071, para 24.

he is satisfied that these emails were – in actual fact – internal emails between HSE staff.

21. Bearing this in mind, he has gone on to consider the HSE's explanations as to why these emails are no longer held. In the internal review it stated that these emails were not saved into its internal electronic database (COIN). It expanded upon this in its letter to the Commissioner dated 21 February 2011. It explained that it holds information in the following ways:

    - Paper files – a paper file relating to a specific investigation is used to retain hard copy information collected from and/or provided to HSE by third parties during the course of an investigation.

    - COIN (Corporate Operational Information System) Database – COIN is an internal electronic database that HSE uses to record all operational aspects relating to its regulatory functions.

    - TRIM (Total Record Information Management) Database – TRIM is an internal electronic database that HSE use to retain corporate information when there is a business need to retain it.

    - Outlook email system – Emails are held in a recipients account and automatically deleted from that account after 90 days, unless manually deleted prior to the 90 day period. Emails that relate to HSE's business must be manually saved from Outlook into TRIM as they cannot be recalled once deleted.

22. The HSE went on to explain that it had undertaken a thorough search of both paper and electronic records in order to establish whether it held these emails. It also confirmed that the search criteria that it had used to search the COIN and TRIM databases were the name of the company where the accident had occurred, and the name of the complainant's client. However, these searches had brought back a nil response.

23. It added that it was the duty of the email recipient, in this case the named HSE employee, to decide whether there was a business need to retain emails. The named HSE employee had confirmed that the emails in question were internal emails between herself and the preceding HSE inspector, rather than with the named company. The named HSE employee had advised that there was not a business need to retain the emails in question, and therefore they had not been saved onto the COIN or TRIM databases, nor retained in the paper file.

24. The complainant has argued that he cannot believe that 'critical emails' could have been deleted in such a very serious incident such as this. Given that the complainant believes that these emails are between the

HSE inspector and the named company where the accident occurred, and that the date of the first of these emails is the same date as the accident (with the subsequent emails dating shortly afterwards), he finds the complainant's views about these apparently critical emails wholly understandable.

25. However, these views are based on an apparently mistaken interpretation of the entry in the Cases Report (as quoted at paragraph 19 above) that it refers to emails between the HSE inspector and the named company around the time of the accident. It is regrettable that this interpretation of the context of these emails was compounded when the HSE also referred to these emails in this way when carrying out its internal review. However, as noted above, the Commissioner is satisfied that these emails were, in fact, internal emails between the HSE inspector and her predecessor.

26. Having considered the HSE's arguments the Commissioner finds them reasonable and persuasive. In particular he has noted that the HSE has spoken with the inspector named as one of those involved in these emails, and has taken into account her comments on the relevance of these emails, together with the HSE's retention policies in relation to information of this kind. Given this, and without evidence to the contrary, the Commissioner finds that, on the balance of probabilities, the HSE did not hold copies of the emails of 3, 7 and 8 July 2009 at the time of the request.

Exemptions

27. As noted above, the HSE has relied upon section 30(1)(b) to withhold the information that it obtained from GMP (as described at paragraph 4 above). However, the Commissioner has first considered whether section 40(1) of the Act applies to some or all of this information.

28. Although this exemption was not referred to by the HSE, given his dual role as the regulator of the DPA, the Commissioner considers it is appropriate for him to consider the application of this exemption.

Section 40(1) – Personal data of which the applicant is the data subject

29. Under section 40(1), requested information that constitutes the personal data of the applicant (as defined in the DPA), is exempt from disclosure under the Act. The effect of this is to remove all of the individual's personal information entirely from the regime of the Act, leaving it subject instead to the information access regime of the DPA. Section 7 of the DPA gives individuals the right to request access to personal data held about them by data controllers. This is referred to as the right of

subject access. Section 40(1) is an absolute exemption, and therefore requires no public interest test to be conducted.

30. The full text of section 40 can be found in the Legal Annex attached to the end of this notice.

31. Section 1 of the DPA defines personal data as information about a living individual who can be identified from that information, or from that information and other information which is in the possession of, or is likely to come into the possession of, the data controller.

32. In this instance the withheld information consists of information obtained by the HSE from GMP, namely:

- copy of the relevant pages from the Oldham CID Day Book,
- copy of relevant diary entries relating to the officers investigating the accident, and
- 33 photographs taken of the scene of the incident.

33. GMP had investigated the circumstances surrounding the accident involving the complainant's client, which had involved (amongst other things) examining the scene of the incident. This information had then been provided to the HSE to assist it in its investigation.

34. The Commissioner has gone on to consider whether this information is the personal data of the complainant's client.

35. The Commissioner is satisfied that the complainant's client is still alive. In addition to this he considers that, given both the contents and context of the withheld information, the complainant's client is clearly identifiable from this information. Furthermore, given that this information relates to a Police investigation into the circumstances surrounding an incident in which he suffered physical injury, the Commissioner is satisfied that the complainant's client is the focus of this information. Bearing these points in mind, the Commissioner finds that all of the withheld information is the personal data of the complainant's client and is therefore exempt by virtue of section 40(1) of the Act.

The Decision

36. The Commissioner's decision is that the HSE dealt with the following elements of the request in accordance with the requirements of the Act:

- The HSE does not hold copies of the emails dated 3, 7 and 8 July 2009 referred to by the complainant.

37. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The information obtained by the HSE from GMP was exempt from disclosure under section 40(1) of the Act. The HSE should have identified this information as the personal data of the complainant's client, and should have dealt with the request for this information as a subject access request under section 7 of the DPA. However the Commissioner has not ordered any remedial steps.

Steps Required

38. The Commissioner requires no steps to be taken.

Failure to comply

39. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. The Commissioner notes that the request for the information the HSE had received from GMP should have been dealt with as a subject access request, under section 7 of the DPA from the outset, and he would encourage public authorities to consider requests under the correct access regime at first instance.

The Commissioner will now conduct an assessment under section 42 of the DPA to determine whether the complainant's client has a right of access under section 7 of the DPA to the information he has decided is exempt by virtue of section 40(1). The outcome of that assessment will be communicated to the complainant in due course.

Right of Appeal

41. 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,
    Arnhem House,
    31, Waterloo Way,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@tribunals.gsi.gov.uk.
    Website: www.informationtribunal.gov.uk

42. 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.

43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 28th day of March 2011

Signed ……

Pamela Clements
Group Manager, Complaints Resolution

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Section 40

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.