

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 February 2013

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

#### Decision (including any steps ordered)

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1. The complainant has requested correspondence held following the death of Robert Fidoe, a young boy who tragically died after falling from his bike into a canal lock at Stourport Basin in 2011. After some confusion about the terms of its initial response, the Health and Safety Executive ("HSE") confirmed that it was refusing to provide this information on the basis of the exemption at section 30(1)(b). It argued that an investigation into this matter was ongoing and that the public interest therefore favoured maintaining this exemption. It upheld this position at internal review.
2. The Commissioner's decision is that HSE was entitled to rely on section 30(1)(b) as a basis for withholding the requested information. No steps are required.

#### Request and response

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3. On 15 June 2012, the complainant requested information of the following description:

*"I refer to the e-zine article at -*

*<http://www.narrowboatworld.com/index.php/news-flash/4501-bw-to-face-corporate-manslaughter-charge>*

*There is great public interest in this case, particularly due to the perception that BW [British Waterways] is putting the public at further risk of death or serious injury (as described in the article).*

*Please provide via [whatdotheyknow.com](http://whatdotheyknow.com) copies of all correspondence*

*to and from BW (or third parties) relating to the matter together with any reports that you have produced."*

4. The HSE responded on 16 July 2012 and refused to provide the requested information. It cited the following exemption as its basis for doing so: Section 31(1) – Law enforcement.
5. On 17 July 2012 the complainant wrote back to the HSE, disputing its position. He also requested a sub-set of the information described in his original request, namely:

*"(1) The date and time that a trial will take place.  
(2) The names of the defendants (organisations or individuals)  
(3) The charge(s)."*

6. On the same day (17 July 2012), HSE wrote again explaining that its letter of 16 July 2012 was *"sent to you in error, in the mistaken belief that the incident in question was the subject of ongoing criminal proceedings"*.
7. It explained that the incident was still the subject of an investigation and that, therefore, it was seeking to rely on a different exemption as a basis for withholding the information in question. The exemption it was now seeking to rely on was: Section 30(1)(b) - (investigations and proceedings conducted by public authorities).
8. It explained that the information was held by HSE for the purposes of an investigation which may lead to a decision to institute criminal proceedings. It set out arguments as to why, in its view, the public interest favoured maintaining this exemption rather than disclosing the information.
9. The complainant requested an internal review on 19 July 2012. HSE sent the outcome of its internal review on 30 July 2012. It upheld its original position and apologised for the errors set out in its first letter of 16 July 2012.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 2 August 2012 to complain about the way his request for information had been handled.
11. The Commissioner has considered whether the HSE is entitled to rely on section 30(1)(b) as a basis for withholding the information requested on 15 July 2012.

## Reasons for decision

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12. Section 30(1)(b) of FOIA states that:-

- “(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—*
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct”*

13. This is a class-based exemption that is qualified by a public interest test. This means that if the information described in the request matches the description of information set out in section 30(1)(b) then the exemption is engaged and the information is exempt from disclosure. However, it can only be withheld from disclosure if the public interest in maintaining that exemption outweighs the public interest in disclosure.

### **Is section 30(1)(b) engaged?**

14. The HSE explained that it was created by the Health and Safety at Work Act 1974 and has investigation and enforcement powers associated with its regulatory role. It provided a satisfactory explanation as to why the requested information was needed by the HSE to carry out its regulatory duties in relation to investigating the events in question. It also explained how the publication of this information at this stage could have an adverse effect on the progress of its investigation.<sup>1</sup>
15. The HSE was reluctant to provide the requested information itself to the Commissioner but agreed to do so following service of an Information Notice under section 51 of the FOIA on 16 January 2013. An information notice requires a public authority formally to provide the Commissioner with any information he needs to conduct his investigation.
16. Having read the information, the Commissioner is satisfied that it falls within the scope of the description set out in section 30(1)(b). He therefore agrees that the exemption is engaged.
17. As noted above, section 30(1)(b) is subject to a balance of public interests test by virtue of section 2 of the FOIA. This means that the exempt information must be disclosed unless the public interest in

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<sup>1</sup> <http://www.hse.gov.uk/enforce/enforce.htm#enfmaaj>

maintaining the exemption cited by the HSE outweighs the public interest in disclosure. The Commissioner has therefore considered the arguments of both parties before reaching a conclusion on this point.

18. While it is unfortunate that HSE cited the wrong exemption in its initial response to the complainant's request, it rectified this error immediately. This error does not undermine the basis for its reliance on section 30(1)(b).

### **Public interest test**

19. The complainant has raised specific concerns as to whether remedial steps taken immediately following the accident were sufficient to prevent further fatal accidents. He argued that it was important to make public communications between HSE and other bodies regarding remedial steps taken to shed further light on this point. The Commissioner recognises that there is a compelling public interest argument in favour of disclosure where that disclosure could identify continuing risks to public safety or that such risks were not being managed in the interests of public safety.
20. The HSE identified the following public interest arguments in favour of maintaining the exemption:
- The HSE's investigation into the fatal accident was ongoing at the time of the request.
  - Disclosure of information while an investigation is ongoing could prejudice the outcome of that investigation and, as a consequence, the course of justice.
  - Disclosure would prejudice the space that the HSE needs properly to conduct its investigation.
  - Future investigations may be hampered or impeded where potential witnesses had concerns about the premature disclosure of their statements.
21. The Commissioner has considered both parties' arguments with specific reference to the withheld information. For obvious reasons he cannot set out the detail of the withheld information on the face of this Notice. He has therefore included analysis of the withheld information in a Confidential Annex to this Notice.

### **Section 30(1)(b) - Conclusion**

22. The Commissioner has taken into account the points raised by the complainant and acknowledges the serious nature of his concerns. The

Commissioner has not taken an “all or nothing approach” and has also considered whether partial disclosure is warranted in the public interest. However, he has concluded that the public interest in protecting the space in which the HSE conducts its investigation into Robert Fidoe’s tragic death outweighs the public interest in disclosure. He has had particular regard for the withheld information itself, the timing of the request and the fact that the investigation was ongoing at that time it was made (and at the time for compliance with that request). In this case he thinks there is a stronger public interest in allowing the HSE’s investigation to take its course without public intrusion into that process.

23. He agrees therefore that section 30(1)(b) is engaged in relation to the requested information and that the public interest in maintaining this exemption outweighs the public interest in disclosure in the circumstances of this case.

## Right of appeal

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24. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

25. 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.
26. 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 .....**

**Lisa Adshead**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Wilmslow**  
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**SK9 5AF**