

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2016

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

Decision (including any steps ordered)

1. The complainant has requested information about breaches of the Working Time Regulations. The Health & Safety Executive (HSE) provided most of the information within the scope of the request but refused to provide the names of the employers, citing the exemption section 41 (information provided in confidence) of the FOIA.
2. The Information Commissioner's decision is that the requested information is exempt from disclosure by virtue of section 41 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

3. On 7 January 2016 the complainant requested the following:

'Since and including 2010, by year and by employer, figures to show how many complaints have been received and upheld about breaches of the Working Time Regulations, showing whether they were for alleged breaches of the maximum weekly working time limit and/or night work limits.

Please may I see the information....

I believe that the information requested is required in the public interest for the following reasons:

- 1. To uphold public confidence that the Working Times Regulations are effectively enforced;*
- 2. To provide assurance that employers improve their performance after punishment for breaching the Regulations;*
- 3. To ensure that money is correctly spent on protecting workers from being made to work excessive hours.'*
4. On 26 January 2016 HSE provided a table showing the figures requested and refused to identify the employers citing section 41(1) of FOIA.
5. The complainant requested an internal review on 26 January 2016. HSE provided the outcome of its internal review on 19 February 2016 and upheld its position.
6. The complainant contacted the Commissioner on 22 February 2016 to complain about the way his request for information had been handled. He argued:

'The HSE has imposed a blanket refusal on all this information on the basis of one argument - that among the offending employers there may be a small business which only has one employee who works nights, and who would therefore be unmasked as a whistleblower.

I would like you to consider the following points:

- 1. Why should it be the employee who works nights who has made the complaint?*
- 2. The complainants have contacted the HSE in confidence and of course that confidence must be preserved.*
- 3. If the HSE was still concerned about a whistleblower being exposed by this request, it could have dealt with the potential problem by excluding from its response small employers, for example those with a dozen staff or fewer, or those with only one night worker.*
- 4. It is important that the public can see trends in poor employment practice and that offending employers should be identified as a punishment and deterrent for their exploitation of workers.'*

Scope of the case

7. The Commissioner considers the focus of the investigation to be whether HSE was entitled to rely upon the exemption at section 41 to withhold the remaining information.

Reasons for decision

Section 41 – information provided in confidence

8. Section 41(1) of the FOIA states that:

“Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and*
- b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”*

Was the information obtained from another person?

- 9. HSE have stated that the information was originally provided from individuals who contact HSE on a voluntary and confidential basis.
- 10. The Commissioner is satisfied that the information was obtained from another person and therefore the requirement of section 41(1)(a) is satisfied.

Would disclosure constitute an actionable breach of confidence?

- 11. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

- 12. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
- 13. HSE have confirmed that it relies on information from individuals who contact HSE on a voluntary and confidential basis ('Whistle-blowing') to

help identify breaches in the Health and Safety at Work Act. There is an expectation that this information will be held in confidence by a public authority and not disclosed into the public domain.

14. HSE have stated that complaints are made against large organisations (e.g. NHS Trusts) and small businesses such as small family-run care homes where there are only few employees who work during the day or at night.

'If we disclosed information relating to these small time employers particularly when working nights, then the complainant/employee could be identified. It was for these reasons that HSE held the dutyholders names from disclosure.'

15. Having regard to the above, and having viewed the file, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. The Commissioner also accepts that the information cannot be said to be trivial as it helps identify breaches of health and safety.

16. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

17. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.

18. In support of its position, HSE have stated that

'HSE as regulatory body relies upon 'whistleblowers' to advise of health and safety concerns. When people contact HSE to raise a concern, they ask if they can remain anonymous as they do not want their employer knowing who has contacted HSE to raise a concern. If HSE disclosed the names of the company's in this case, it could result in the person who has raised the concern being identified – this in HSE's opinion would breach the confidence of the 'whistleblower', who has provided information to HSE.'

'HSE will always keep the name of a complainant confidential, this is to ensure the public remain confident that 'whistleblowers' details will not be disclosed to encourage the continued sharing of information with regard to poor health and safety practices. HSE consider this to be paramount.'

'HSE routinely publish enforcement action we have taken against dutyholders who have been found to have breached health and safety legislation...However, disclosing dutyholder information that may identify an individual when the dutyholder has not been trialled in a court of law is not, in HSE's view, in the public interest.'

19. The Commissioner accepts that the information would have been communicated in confidence to HSE in its official capacity as regulator and investigator. He is also satisfied that there would have been no reasonable expectation on behalf of the confiders at the time, that this may be put into the public domain in the future. Therefore, the Commissioner accepts that there is both an implied and explicit obligation of confidence on the part of HSE that it will not share information provided as part of this process.

Would disclosure be of detriment to the confider?

20. HSE maintain the position that the names of the dutyholders (employers) should not be disclosed into the public domain in order to keep the identity of the whistleblowers confidential, and allow the public to know that they can approach HSE to raise concerns in a confidential manner.
21. 'The loss of privacy can be a detriment in its own right' (Bluck v ICO & Epsom and St Helier University Hospital NHS Trust [EA/2006/0090] para 15.) and so the Commissioner considers that there is no need for there to be any detriment to the confider, in terms of tangible loss, in order for it to be protected by the law of confidence.
22. The Commissioner considers that while disclosure would cause no positive harm to the confider, knowledge of the disclosure of the information pertaining to the names of the employers could identify and distress the whistleblowers.

Is there a public interest defence for disclosure?

23. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether HSE could successfully rely on such a public interest defence to an action for breach of confidence in this case.
24. HSE accept that there is likely to be a public interest in promoting openness and transparency and informing the public of any wrongdoing. This is achieved with the publication of enforcement action taken against

dutyholders who have been found to have breached health and safety legislation. None of the complaints about working time regulations have resulted in any formal enforcement action.

25. HSE argue that the reasons for withholding the information are:
- There is an expectation by the 'confider' that the information supplied to HSE will only be used or disclosed in accordance with the wishes of the confider.
 - Disclosure of the information may undermine the principle of confidentiality. People would be discouraged from confiding in HSE if they do not have a degree of certainty that such confidences would be respected.
 - There is a public interest in maintaining trust and preserving a free flow of information to HSE as without it, there could be an impact on HSEs regulatory functions as we rely upon members of the public and employees to inform HSE of potential breaches of health and safety.
26. The complainant has accepted that the names of the confiders must be kept confidential (see paragraph 6 above) but argues that the names of the employers could be disclosed without breaching the confidentiality of the confiders by excluding small employers or 'those with only one night worker'. HSE explained that they could have excluded small employers from the response but it is not possible, without further work, to establish the number of employees who work at any one time i.e. day or night. HSE stated that it is not in the public interest to be potentially identifying confiders and it believes that disclosing dutyholders names could do this.
27. The Commissioner acknowledges that there is a public interest in transparency but the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant.
28. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in

maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.

29. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining the trust between confider and confidant; and that HSE would not have a public interest defence for breaching its duty of confidence.
30. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
31. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Right of appeal

32. 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

33. 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.
34. 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

Pamela Clements
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