

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

Decision notice

Date: 28 September 2021

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 information about demolition work at a particular site. Having originally withheld all the relevant information it holds, the Health and Safety Executive (HSE) has now disclosed some of the information. HSE has advised it does not hold some of the requested information. It has withheld the personal data of third persons and has withheld the remainder of the information under regulation 12(5)(b) of the EIR (course of justice), regulation 12(5)(a)(public safety) and regulation 12(4)(b) (manifestly unreasonable request). HSE considers the public interest favours maintaining these exceptions.
2. The complainant considers that HSE holds further information within scope of her request and that the information withheld under regulation 12(5)(b) should be disclosed.
3. The Commissioner's decision is as follows:
 - HSE holds information within the scope of part [1] of the request and has therefore breached regulation 5(1) and regulation 5(2) of the EIR in respect of that part.

- On the balance of probabilities, HSE holds no further information within scope of parts [2], [5], [7] and [11] of the request and has complied with regulation 5(1) in respect of those parts.
 - HSE is entitled to rely on regulation 12(5)(b) to withhold information within scope of parts 2 and 11 of the request, and the public interest favours maintaining this exception.
 - HSE failed to provide its internal review response within the statutory time period of 40 working days and, as such, breached regulation 11(4) of the EIR.
4. The Commissioner requires HSE to take the following step to ensure compliance with the legislation.
 - Provide the complainant with a response to part [1] of her request that complies with the EIR.
 5. HSE must take this step 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.

Background

6. In its initial submission to the Commissioner on 5 August 2021, HSE provided a background to the request. It advised that HSE is the statutory body responsible for the regulation and enforcement of workplace health, safety and welfare within the UK. Its statutory powers and responsibilities are derived from the Health and Safety at Work etc Act 1974 (HSWA) and associated relevant statutory provisions. This legislation provides HSE's Inspectors with powers of entry to workplaces, powers to investigate incidents and powers to take enforcement action, including prosecution, against those responsible for offences under the HSWA and associated legislation.
7. At the time of the complainant's request, HSE was investigating a concern that had been raised by a member of the public regarding demolition work at a particular address, and the removal of asbestos.

Request and response

8. On 27 April 2020 the complainant wrote to HSE and requested information in the following terms:

"I am asking that any documents or correspondence held by the HSE in relation to this site be released to me under the Freedom of Information Act. I believe the information requested to be in the public domain and the public interest and can see no reason why it should not be supplied.

I know from correspondence with HSE that HSE Inspectors visited the site on 31st January, 8th, 10th and 20th February. [1] I am requesting copies of their reports and any other reports relating to HSE Inspectors' visits at this site.

[2] I understand from correspondence with HSE that complaints from members of the public, councillors and the MP were received between 30th January and 7th February 2020 and I am requesting copies of these complaints.

I am also requesting copies of:-

[3] The pre-demolition asbestos survey report

[4] The asbestos method statement

[5] Consignment notes for waste and hazardous waste removed from the site

[6] Construction Phase Plan

[7] F10 Notification

[8] Notification of Contravention

[9] Improvement Notice

[10] Action Plan

and [11] and correspondence between HSE, the MP, [Redacted] Council Officers and the developers of this site."

9. HSE responded on 6 May 2020. At that point it handled the request under the FOIA and advised that the requested information was exempt from disclosure under section 30(1)(b) (investigations and proceedings) and section 41 (information provided in confidence).
10. The complainant requested an internal review on 15 May 2020. She did not receive a review and HSE did not provide one despite the Commissioner's correspondence to it on 30 November 2020 instructing it to provide the complainant with a review response.

11. The Commissioner accepted the complaint as eligible for further consideration without a review. However, in correspondence to the Commissioner on 5 August 2021, HSE advised her that it had reconsidered its response to the request, and it sent the complainant this fresh response in correspondence dated 9 August 2021.
12. HSE noted in its fresh response that it had been incorrect to handle the request under the FOIA originally and that the correct legislation was the EIR. HSE confirmed that it does not hold some of the information the complainant has requested. Given the passage of time, HSE released other information that it does hold but had withheld at the time of the request. HSE advised it was withholding the remaining information it holds under regulation 12(4)(b) and regulation 12(5)(b) of the EIR. It advised it considered the public interest favouring maintaining these exceptions. Finally, HSE also withheld personal data under regulation 13.

Scope of the case

13. The complainant first contacted the Commissioner on 9 November 2020 as she had not received an internal review from HSE. Following HSE's fresh response to the request of 9 August 2021, in correspondence to the Commissioner on 22 August 2021 the complainant confirmed that she remained dissatisfied, and the scope of her complaint.
14. First, the complainant noted HSE's correspondence dated 9 August 2021 but said she was still seeking a copy of the "internal review". In the Commissioner's view, its correspondence of 9 August 2021 was, in effect, HSE's internal review response.
15. The complainant next advised that she considered HSE holds information, or further information, within scope of parts 1, 2, 5, 7 and 11 of her request. The complainant also disputed HSE's reliance on regulation 12(5)(b) as applied to parts 2 and 11 of the request. Finally, the complainant advised that she was "not interested" in personal data and did not expect HSE to release personal data.
16. The Commissioner's investigation has therefore focussed, first, on whether HSE holds any information/further information within scope of parts 1, 2, 5, 7 and 11 of the request.
17. The Commissioner has then considered whether HSE is entitled to withhold information within scope of parts 2 and 11 of the request under regulation 12(5)(b) of the EIR and the balance of the public interest.

Reasons for decision

Regulation 5 – duty to make environmental information available on request

18. Under regulation 5(1) of the EIR a public authority that holds environmental information shall make it available on request, if the information is not the applicant's own personal data or otherwise exempt from disclosure.
19. Under regulation 5(2), information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
20. The complainant considers that HSE holds further information within scope of parts of her request. First, she says that a letter she received from HSE on 4 March 2020 referred to visits to the site in question in January and February 2020 and she considers that HSE holds Inspectors' reports generated by those visits. The relevant element of her request is part 1, as follows:

"... [1] I know from correspondence with HSE that HSE Inspectors visited the site on 31st January, 8th, 10th and 20th February. I am requesting copies of their reports and any other reports relating to HSE Inspectors' visits at this site..."
21. None of HSE's correspondence with the complainant appears to address this part of the request specifically and the Commissioner raised this with HSE. In a second submission to the Commissioner dated 14 September 2021, HSE confirmed that HSE does not hold an IMPACT (Inspection) report associated with the incident, reported to HSE via its concerns team.
22. HSE confirmed that it did visit the site on the dates the complainant detailed but it did not create an IMPACT report relating to these visits. HSE says that it updated information about its activities within COIN, HSE's corporate operational database system. HSE goes on to say that it did not consider disclosing a copy of the COIN material at the time of the complainant's request or as part of the Commissioner's investigation. This is because the complainant did not request a copy of what HSE has described as "our report" into the incident.
23. If the complainant had, HSE says, it would have considered whether the COIN report could be disclosed. HSE goes on to explain that it has already provided the complainant with much of the information within the COIN report through 'normal course of business' as a result of complaints that the complainant has sent to HSE's Chief Executive. HSE

says that its letter to the complainant dated 4 March 2020 details in full the actions HSE took with regard to the site in question.

24. HSE has referred to two types of report: Inspectors' (IMPACT) reports and COIN reports; it considers these are distinct and that because the complainant's request referred only to Inspectors' reports, its corporate COIN report was out of scope. In the Commissioner's view, an applicant cannot be expected to know how a particular public authority holds, manages and names information; in this case, there is no reason why the complainant would be aware of HSE's COIN system and know to request information from that system.
25. It is clear that the complainant has an interest in information about a particular incident. In addition, the complainant has referred to Inspectors' reports in her request, but she has also referred to "any other reports relating to HSE Inspectors' visits to this site". As such, the Commissioner considers that HSE should have interpreted part 1 of the request as including relevant information it holds on COIN. First, the complainant has referred to "any other reports" in her request and, second, even if she had not made that reference, some material was held on HSE's COIN system directly as a result of its Inspectors' visits to the site.
26. Irrespective of whether HSE has provided much of the relevant material on COIN through another route, the Commissioner therefore finds that HSE *does* hold information within scope of the element of the request that is for Inspectors' reports.
27. Second, in response to part [2] of the request - complaints about the incident that it has received from members of the public, councillors and the local MP - HSE has provided the complainant with a broad summary of the complaints received, with dates. This material is discussed in the regulation 12(5)(b) analysis below. However, the complainant considers HSE holds further information within this part.
28. Third, in response to part [5] of the request - consignment notes for waste and hazardous waste removed from the site - HSE has disclosed a 'Bulk Identification' document and a 'Job Completion Certificate' document, with personal data redacted. However, the complainant considers that HSE also holds consignment notes for waste and hazardous waste removed from site which would show how this hazardous waste was removed and its final destination.
29. Fourth, in response to part [7] of the request HSE has disclosed an 'F10 - Notification of Construction Project' document in full. However, the complainant considers that HSE also holds an F10 notification associated

with the commencement of development (including demolition) on the site from 31 January 2020.

30. Finally, with regard to part [11] of the request, in correspondence to the Commissioner the complainant has noted that the list HSE provided to her of the relevant correspondence that it is withholding under regulation 12(5)(b) (and regulation 13) referred to its correspondence with the developer only. The complainant considers that HSE must also hold relevant correspondence with local councillors and the local MP. This is because, the complainant says, the local Council's Environmental Protection and Building Control departments were both in contact with HSE in February 2020, and a Council officer advised the local MP's office to contact HSE about the incident.
31. In its submission to the Commissioner of 14 September 2021, HSE addressed those four parts of the request specifically and advised that it does not hold the further information that the complainant is seeking. HSE explained that all of its corporate information is held within COIN or within HSE's electronic records management system - CM9. HSE confirmed to the Commissioner that it has undertaken a full search of these systems and the only information [about the investigation] that HSE holds is held in COIN. The Commissioner understands HSE to mean that it did not identify any new information relevant to the above four parts of the request.

Conclusion

32. With regard to part 1 of the request, the Commissioner accepts that HSE does not hold the "Inspectors reports" that the complainant requested but she finds that HSE does hold information that falls within scope of that part of the request. As such, HSE's response to part 1 breached regulation 5(1) and 5(2) of the EIR.
33. The Commissioner cannot consider whether a public authority *should* hold information that an applicant is seeking; she can consider solely whether or not the information is held, on the balance of probabilities. With regard to parts 2, 5, 7 and 11 the Commissioner accepts HSE's explanation that any such information would be held in its corporate and electronic records management systems, that it has searched these systems and has not identified any further relevant information. The Commissioner therefore finds that HSE has complied with regulation 5(1) of the EIR in respect of those parts of the request.

Regulation 12(5)(b) – the course of justice and inquiries

34. Under regulation 12(5)(b) of the EIR, a public authority may refuse to disclose information to the extent that its disclosure would adversely affect (a) international relations, defence, national security or public safety; or (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
35. In this case, the information relates to HSE's investigation under the HSWA into an incident involving demolition at a site and the removal of asbestos. The Commissioner is satisfied that the information falls within the class of information potentially covered by the exception.
36. The additional requirement necessary for the exception to be engaged was addressed in the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037), when the Information Tribunal highlighted that there must be an "adverse effect" resulting from disclosure of the information, as indicated by the wording of the exception.
37. The Commissioner's guidance also notes that, in accordance with the Tribunal decision in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" (in "would adversely affect") is "*more probable than not*".
38. Under regulation 12(5)(b), HSE is withholding information associated with a concern it received from a member of the public (part 2 of the request) and correspondence it had with a developer (part 11). HSE has provided the Commissioner with copies of this material.
39. In its original response to the complainant, HSE had withheld all of the requested information under section 30 of the FOIA, which is the equivalent of regulation 12(5)(b) of the EIR. In that response, HSE had explained that the incident in question was still under investigation and that the public interest favoured withholding the information as disclosure would impede the ongoing investigation and reduce the chances of a successful prosecution.
40. At the point of its internal review response on 9 August 2021 HSE had concluded its investigation. It disclosed some of the information it had previously withheld under section 30 but, accepting that the EIR is the correct legislation under which to consider the request, HSE continued to withhold some information under regulation 12(5)(b) of the EIR.
41. In its initial submission to the Commissioner of 5 August 2021, HSE said that it was relying on "Regulation 13" to withhold some information

because those documents “have either been created by HSE or received by HSE in the course of our statutory function”. Even though its investigation of the incident has concluded, HSE considered the disclosure of that material would have a prejudicial impact on its ability to carry out future investigations. To summarise, this was because the public would be less likely to raise concerns, those under investigation would be less likely to volunteer information and disclosure would breach the data protection principles.

42. HSE’s first submission seemed to conflate regulation 13 and regulation 12(5)(b). However, in its subsequent submission of 14 September 2021, HSE addresses regulation 12(5)(b) directly. It says that when it investigates concerns and/or incidents its primary focus is to work with those under investigation to establish if there has been a breach of health and safety legislation, or other regulations. It proactively works with those under investigation rather than enforce in a “demonstrative” way. This approach will often result, HSE says, in it acquiring much more information on a voluntary basis than it might have received if it had engaged its regulatory powers to mandate the recovery of information.
43. In HSE’s view, if it were to start routinely disclosing into the public domain information it has acquired during the course of an investigation, those under investigation now and in the future are much less likely to proactively volunteer information to it.
44. HSE also considers that the public would be less willing to raise concerns with it if details of their concern were subsequently disclosed into the public arena. Even anonymised documentation could identify a whistleblower. HSE says that the public raise concerns with HSE in the expectation that their concern will be investigated but their details will remain confidential.

Conclusion

45. At the time that the complainant submitted her request for information to HSE, on 27 April 2020, HSE’s investigation into the incident in question was still live. As such, the Commissioner accepts that if this material were to be disclosed during the course of an investigation it would make those involved in the incident less likely to volunteer further information to the HSE. The Commissioner accepts too that it would also potentially make the public and involved parties less likely to volunteer information to HSE in its HSWA investigations of future incidents. Second, disclosing the information in this case would frustrate HSE’s efficient investigation of the incident. This is because, given the circumstances, and the interest of different parties in the incident, the Commissioner considers that disclosure could have

generated further correspondence and queries to HSE, distracting it from its investigation.

46. The Commissioner has therefore decided that HSE was entitled to rely on regulation 12(5)(b) to withhold the complaint correspondence and HSE's correspondence with a developer. She considers disclosing this information at the time of the request would have prejudiced HSE's ability to carry out its investigation. The Commissioner has gone on to consider the public interest test associated with this exception.

Public interest test

Public interest in disclosing the information

47. In her correspondence to the Commissioner on 22 August 2021. the complainant has discussed the background to her request and the concerns about asbestos on the site in question, the potential risks to residents' health, what she considers to have been an "unlawful demolition" and the HSE's investigation into those matters.
48. The complainant argues that disclosing HSE's correspondence with the developer is in the public interest as HSE needs to be transparent about the way it handled the above investigation.

Public interest in maintaining the exception

49. HSE considers that its communications with the developer in this case is of limited wider public interest and it is concerned that disclosing this correspondence would be unfair to the developer as that information could be used to their detriment. The Commissioner understands from its submissions to her that HSE considers that there is public interest in it being able to carry out robust and effective investigations, which is best achieved by it drawing on information that the general public and those under investigation are content to volunteer to HSE.

Balance of the public interest

50. Levels of interest to the public, which the Commissioner considers is limited in this case in any event, is not a relevant factor under regulation 12(5)(b) and cases involving civil and criminal investigations, proceedings and inquires. However, as has been noted, at the time of the request, HSE was still investigating the incident in question. Had HSE provided an internal review within the required timescale, the investigation may still have been live at that point also. The Commissioner appreciates the complainant's public interest arguments, but she does not find them to be compelling. The Commissioner finds that there was greater public interest in HSE being able to conduct an efficient and robust investigation – in the current case and in the future.

This could best be achieved by parties being prepared to volunteer information to an HSE investigation and being confident that HSE would treat that information confidentially.

Procedural matters

Regulation 11 – representations and reconsideration (internal review)

51. Regulation 11(4) is relevant in this case; this requires a public authority to inform the requester of the outcome of the internal review as soon as possible and not later than 40 working days after that date on which an internal review was requested.
52. The complainant submitted her internal review request on 15 May 2020. The Commissioner wrote to HSE on 30 November 2020, instructing it to provide a review. No review was provided and the case was accepted without one. At which point, on 9 August 2021, HSE finally provided the complainant with a review response.
53. The Commissioner appreciates that the COVID-19 pandemic is likely to have had an impact on HSE's resources and its ability to respond in a timely manner. However, given that there has been a failure to meet the statutory timescales, the Commissioner must find that HSE has breached regulation 11(4) of the EIR.

Right of appeal

54. 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

55. 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.
56. 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

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