

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2022

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

Decision (including any steps ordered)

1. The complainant has requested information regarding a tunnel collapse.
2. The Commissioner's decision is that the Health and Safety Executive ("the HSE") has failed to comply with its duties under section 1(1) of FOIA and, to the extent that the information may be environmental, Regulation 5(1) of the EIR.
3. The Commissioner requires the HSE to take the following steps to ensure compliance with the legislation.
 - Confirm or deny whether it holds any information falling within the scope of the request.
 - If and to the extent that information is held, either
 1. disclose that information or;
 2. issue a refusal notice that complies with section 17 of FOIA or;
 3. to the extent that the information is environmental, issue a refusal notice that complies with Regulation 14 of the EIR.
4. The HSE 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 19 May 2021, the complainant wrote to the HSE and requested information in the following terms:

"I would like to request that you supply a copy of the report carried out by HSE into the collapse of a tunnel over a railway at Gerrards Cross. This accident occurred on 30 June 2005. My understanding is that this report has not yet been released but was completed in 2015.

"Please would you therefore provide a copy of the above report. If you are unable to do so please would you confirm when the report is likely to be published."

6. On 14 June 2021, the HSE replied to the request. It stated that:

"HSE completed its work on the investigation in early 2015. A report has not been published and there are no plans to do so."

7. The complainant sought an internal review on the same day. Despite the intervention of the Commissioner, the HSE had not provided an internal review at the date of this notice.

Scope of the case

8. The complainant first contacted the Commissioner on 4 October 2021 to complain about the way his request for information had been handled.
9. Considering its response of 14 June to have been inadequate, the Commissioner wrote to the HSE on 16 October 2021. He noted that the HSE's response did not appear to comply with the requirements of the legislation and suggested that the most practical way forward would be for the HSE to complete the internal review that the complainant had sought, with a view to making its position clear. Given that the HSE had already had four months in which to complete its internal review at that point, the Commissioner asked the HSE to complete the review within 10 working days.
10. The HSE responded to the Commissioner on 3 November 2021 to say that it was unable to meet his deadline. It noted that the incident referred to in the request had occurred some considerable time ago and that staff turnover had meant that none of the original staff were still working for the HSE. It had searched electronic records but, given the need for a search of hard copy documents and a backlog of internal

reviews it estimated that it was likely to need a further month to complete the review.

11. The Commissioner replied to the HSE the following day. He noted that, some six months after the request had been submitted, the HSE did not appear to know whether it held any relevant information, let alone explained why it could not be communicated to the complainant.
12. Rather than issue an immediate decision notice and mindful of the burden that the HSE had already highlighted to him, the Commissioner informed the HSE that he would be accepting the complaint for formal investigation. The Commissioner noted that, due to his workload, he was unlikely to be able to allocate the complaint for investigation for at least three months. He made clear to HSE that he expected this time to be used for the completion of the internal review so that, when the complaint was allocated for investigation, he had a clear understanding of the stance the HSE was taking. The Commissioner also informed the HSE that, in the event that the internal review was not complete when the complaint was allocated, he might proceed immediately to a decision notice without further warning.
13. The Commissioner has received no further reply from the HSE on this matter at the date of this notice and therefore considers that a decision notice is necessary.
14. The Commissioner considers that the scope of this notice is to determine whether the HSE has complied with its duties under FOIA and the EIR.

Reasons for decision

Would the requested information be environmental?

15. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
16. The Commissioner has not seen the requested information but, as it is information relating to the collapse of a railway tunnel, he considers that a substantial proportion of the information is likely to be information on the state of human health and safety inasmuch as it is affected by the elements of the environment or on measures affecting or likely to affect the elements of the environment. The Commissioner therefore takes the view that, where held, most of the information is likely to be environmental information and should thus fall to be dealt with under the EIR. However, he has also considered the position under FOIA – in the event that the HSE holds any information that is not environmental.
17. Regulation 5(1) of the EIR requires a public authority to communicate environmental information on request unless an exception applies.
18. The Commissioner considers that the request in question constituted a valid request for information under the EIR.
19. There is no explicit requirement under the EIR for the public authority to confirm or deny that it holds the information that has been requested – although the Commissioner considers it good practice to do so. However, where a public authority does not hold the particular information that has been requested, it should issue a refusal notice and cite Regulation 12(4)(a) of the EIR (information not held).
20. At the date of this notice, the HSE had not issued a refusal notice citing Regulation 12(4)(a) of the EIR – or indeed any other exception from the duty to disclose environmental information. Nor had the HSE communicated any information to the complainant.

21. The Commissioner therefore finds that the HSE has failed to comply with its duty under Regulation 5(1) of the EIR.
22. Section 1(1) of FOIA 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.
23. Section 8(1) of FOIA states:

In this Act any reference to a “request for information” is a reference to such a request which –

 - (a) is in writing,
 - (b) states the name of the applicant and an address for correspondence, and
 - (c) describes the information requested.
24. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under FOIA.
25. At the date of this notice, the HSE had not informed the complainant whether it held any information within the scope of the request. It had not issued a refusal notice and it had not communicated any non-exempt information.
26. The Commissioner therefore finds that, to the extent that the HSE holds non-environmental information within the scope of this request, it has failed to comply with its obligations under section 1(1) of FOIA.

Other matters

27. It is the HSE’s right (as with any decision notice) to appeal this decision if it considers that the Commissioner has applied the law incorrectly. However, in the absence of a successful appeal, the Commissioner wishes to place the HSE on notice that, once this decision has been complied with, should the complainant remain dissatisfied, he (the Commissioner) will proceed immediately with an investigation under either section 50 of FOIA or Regulation 18 of the EIR.

Right of appeal

28. 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

29. 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.
30. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF