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## HEALTH AND SAFETY COMMISSION

### Amendment of HSWA section 28 to bring in line with the Freedom of Information Act 2000

**A Paper by Keith Pritchard**

**Cleared by Peter Brown on 1 October 2003**

#### **Issue**

1. Development of options for removing unnecessary barriers to openness in HSWA section 28 and for public engagement/participation in the process. Section 28 restricts disclosure of information provided to HSE in compliance with a legal requirement or through the exercise of powers.

#### **Timing**

2. Routine.

#### **Recommendation**

3. That the Commission notes progress to date and endorses the approach set out in this paper.

#### **Background**

4. HSC has a long-standing public commitment to openness. In its response to the Government's proposals for Freedom of Information, in 1999, it noted that "greater openness with health and safety information improves public understanding of health and safety and helps strengthen confidence in the health and safety system. To be seen as credible and accountable organisations HSC/E must also be open."
5. HSC also noted that:

"at present moves towards greater openness are constrained by the statutory restriction on disclosure in Section 28 of the Health and Safety at Work etc. Act 1974 but our intention is that the Bill will be able to remove this restriction provided there are certain minimum safeguards for prejudice to our enforcement and regulatory functions"

and to maintain the flow of information to us from those we regulate.”

6. This commitment has been endorsed by Ministers and was included in the *Revitalising Health and Safety* strategy as Action Point 39.
7. Section 28 will be brought in line with FOI using the Order-making powers in section 75 of the FOI Act 2000. These powers enable the Secretary of State for Constitutional Affairs to amend other legislation, including primary legislation, to the extent necessary to remove or relax a restriction that prevents disclosure upon request, but not to make more extensive changes.
8. In addition to HSWA section 28, the following other health and safety provisions contain restrictions on disclosure which will be amended or removed using the FOI Act Order:
  - Factories Act 1961, section 154;
  - Offices, Shops & Railway Premises Act 1963, s59; and
  - Offshore Installations (Inspectors and Casualties) Regs 1973, reg 7(4).

## **Argument**

9. Within HSE, a cross-Directorate Project Team is developing legal instructions on an amendment to Section 28 that will:
  - remove restrictions preventing disclosure in response to an FOI request (and thus fall within the *vires* of FOI Act Section 75), and also
  - achieve HSC/E’s wider objective of enabling greater proactive openness.

These legal instructions will need to be cleared with DWP and then passed to the Dept for Constitutional Affairs (DCA) in early 2004 to enable the Order to be drafted.

10. Formal public consultation, such as HSC undertakes in relation to health and safety legislative proposals, is not a requirement under the FOI Act, and the DCA is not intending to carry out such an exercise. Nonetheless, we anticipate that there will be considerable public interest in how HSWA Section 28 is changed.
11. It therefore makes good sense for HSC/E to tap into this outside interest and encourage interested parties to share their views and concerns on how Section 28 can be brought in line with the FOI Act. Such views and concerns are likely to be more reasoned, and expectations more realistic, if based on properly explained arguments as to:
  - why options for legislative change are constrained by the *vires* of the Order-making powers in the FOI Act; and

- why bringing Section 28 in line with the FOI Act is unlikely, in practice, to enable HSE to release very much more information in future than it does at present.
12. We plan to have a two-stage 'consultation' process, taking advantage of the opportunity to pilot an electronic communications facility that will enable anyone with an interest to join a topic group, gain online access to background notes and discussion papers, make their views known, and participate in discussions.
  13. We expect to launch the first stage in the second half of October. This stage will last four weeks - known interested parties will be invited to join the group and play a proactive role in finalising the discussion material – for example, by helping refine any of the arguments. The participation of any Commissioners interested in joining this first stage would be very welcome.
  14. The second stage will be more akin to the public discussion HSC/E invites by means of published Discussion Documents. The second stage will run for twelve weeks, and the electronic Group Communications module will again enable people to access the discussion material online and participate in group discussions. There will be, in parallel, an opportunity for people to request the discussion material as a printed document, and to submit their responses by post or email.
  15. Draft discussion papers have been prepared for the first stage, and are attached as follows:
    - Annex 1 – Introduction;
    - Annex 2 - Question and answer briefing note;
    - Annex 3 – Section 28 – what it does, and when disclosure is for the purposes of HSE's/an Inspector's functions;
    - Annex 4 – Section 28 – full text;
    - Annex 5 – What the proposed amendment will do;
    - Annex 6 - (i) Some examples of information HSE would like to release but Section 28 prevents this; and  
(ii) Some examples of information which HSE would likely still withhold under FOI, after Section 28 has been amended;
    - Annex 7 - the FOI Act 2000 – Sections 1 and 75, and the categories of exempt information;
    - Annex 8 – Note on the Common Law duty of confidence.

## **Consultation**

16. Within HSE and with DWP.

## **Presentation**

17. HSC/E's role in the Section 28 amendment is informal. Nonetheless, both DCA and DWP are looking to HSC/E, as 'guardian' of the health and safety system, to take the lead. Opening up to public scrutiny the arguments supporting our conclusions as to the way forward will provide reassurance that HSC/E is genuinely committed to openness and freedom of information.

18. Also, HSC/E's informal role in this exercise lends itself to innovative ways of involving the wider public in our deliberations – such as piloting a new consultation module being developed for HSC/E's group communications facility – alongside the more usual printed form of discussion document.

19. We will develop a media-handling strategy to cover both potentially positive and negative aspects of the Section 28 amendment.

## **Costs and Benefits**

20. As originally set out in HSC/99/127 – the main benefits from greater openness with health and safety information are a public better informed about health and safety which leads to greater understanding of and confidence in the health and safety system. It also makes HSC/E seem more credible and accountable organisations, which is in line with the strategic themes on openness and accountability. These benefits are, however, not quantifiable.

## **Financial/Resource Implications for HSE**

21. As originally set out in HSC/99/127.

## **Environmental Implications**

22. None.

## **Other Implications**

23. None.

## **Action**

24. The Commission is invited to endorse the approach set out in this paper.