

**BRINGING SECTION 28 OF THE HEALTH AND SAFETY AT WORK
ETC ACT, 1974 (HSW ACT) IN LINE WITH THE FREEDOM OF
INFORMATION ACT, 2000 (FOI ACT)**

This note provides answers the following questions. Click on the link to go to that question

[*What does Section 28 of the HSW Act do?*](#)

[*Why not just repeal Section 28?*](#)

[*What are the options for amending S28?*](#)

[*What practical effect will changing Section 28 have?*](#)

[*How will HSE apply a 'public interest' test?*](#)

[*Won't the FOI Exemption relating to health and safety just take over from Section 28?*](#)

What does Section 28 of the HSW Act do?

1 Some provisions of health and safety law require duty-holders to provide information (to HSE or another Enforcing Authority). For example, the RIDDOR regulations require duty-holders to report types of incident, disease or dangerous occurrence. And Inspectors have legal powers to require persons to answer questions, produce documents etc, and cooperate with investigations.

2 Section 28 protects the confidentiality of information which people are required to provide to HSE or Inspectors. It equates to and, in relation to the HSW Act, overrides the common law duty of confidence¹. The starting point of S28 is that:

“no relevant information shall be disclosed without the consent of the person by whom it was provided” [s28(2)], and

“A person shall not disclose any information obtained by him [during an investigation²] except... with the relevant consent³ [s28(7)].”

These are general duties. They set the ‘default’ position that confidence is protected, except in limited circumstances where the information has to be disclosed for the purposes of the HSW Act itself – ie, health and safety related purposes.

3 Without consent, therefore, such information, essentially, can only be disclosed:

- for **legal proceedings**,
- for **the purposes of functions concerned with health and safety** (ie, HSC’s, HSE’s, inspectors’, or others’ as specified in S28 of the HSW Act), or
- **if otherwise permitted by law** (eg, the Data Protection Act 1998, the Anti-terrorism, Crime and Security Act 2001).

1 Common Law Duty of Confidence - In general, any information given or received in confidence for one purpose may not be used for another purpose or passed to anyone else without the consent of the person who provided it.

2 ie, as a result of the exercise of any power conferred by section 14(4)(a) or 20 (including, in particular, any information with respect to any trade secret obtained by him in any premises entered by him by virtue of any such power).

3 “relevant consent” means, in the case of information furnished in pursuance of a requirement imposed under section 20, the consent of the person who furnished it, and, in any other case, the consent of a person having responsibilities in relation to the premises where the information was obtained.

Why not just repeal Section 28?

4 This was originally the plan. But we now know that if section 28 was just repealed the situation would be more complicated – because the common law duty of confidence would no longer be disapplied. And there would be:

- no safeguard in the HSW Act itself preventing HSE or inspectors disclosing information inappropriately – eg, in circumstances where this might cause harm or damage to the person who was compelled to provide the information, and
- no provision for HSE/inspectors to provide proactively information where it might be in the public interest (the general right of access to information in the FOI Act does not apply to proactive disclosures).

No safeguard in the HSW Act itself preventing HSE or inspectors disclosing information inappropriately – eg, in circumstances where this might cause harm or damage to the person who was compelled to provide the information

5 There may, however, be other legal barriers to disclosure, both statutory and non-statutory. Therefore, to find out if such disclosure would be otherwise lawful HSE would need to consider whether it would breach statutory protections provided by:

- The Data Protection Act 1998
- The Human Rights Act, 1998

6 Other statutory protections that may also need to be considered include:

- The Defamation Acts, 1952 and 1996
- The Rehabilitation of Offenders Act 1974
- The Telecommunications Act 1984, section 43 (improper use of public telecommunication system)
- The Protection from Harrassment Act 1997.

7 HSE would also need to consider whether disclosure would constitute a breach of the common law duty of confidence⁴. Where an individual has not given their consent to the use or disclosure of information for a purpose, which is different to that which was originally intended, it will need to be carefully considered whether a duty of confidence exists. Relevant considerations will include whether:

- the information has a quality of confidence.

⁴ See Note 7 for an explanation of the common law duty of confidence

NOTE 1

- it became known in circumstances imposing an obligation of confidence (legitimate expectation).
- there has previously been or would be an unauthorised use of that information.

8 HSE and inspectors have functions set out in the HSW Act, and must act in accordance with those functions – ie, with the general purpose of securing the health, safety and welfare of workers, and protecting others against health and safety risks arising from work activities. Unless doing so for purposes otherwise legally provided for, we must collect and use (including disclose) information for the purposes of our functions.

No provision for HSE/inspectors to provide proactively information where it might be in the public interest

9 At present, HSC/E has a clear dispensation to disclose information where it is for the purposes of its functions. Removing Section 28 entirely would also remove that dispensation. This could make it more difficult for HSC/E to provide information proactively for the purposes of our functions, since we would revert to a situation where proactive disclosure would be subject to the common law duty of confidence (by contrast, the general right of access to information in the FOI Act will provide a statutory basis for reactive disclosure - ie, in response to a request for information).

10 So, instead of having a clear dispensation to disclose for the purpose of our functions, the reverse would be the case. HSC/E could be sued if it proactively disclosed S28 information which gave rise to a claim for damages. To avoid this risk HSE, in addition to showing that disclosure was for the purposes of its functions, would need also to show that the public interest in providing the information was (a) greater than any public interest in maintaining its confidence – and (b) sufficiently important, in effect, to outweigh the fact that a specific statutory allowance for providing information in such circumstances had been removed.

What are the options for amending S28?

11 Both the Health and Safety Commission and the Government have made it clear that they want

“to remove restrictions on disclosure imposed by HSWA section 28”⁵, and “to bring it in line with the Freedom of Information Act 2000”⁶.

12 The Freedom of Information Act contains an order-making power⁷ which can be used to amend or repeal legislation to the extent necessary to remove or relax a restriction that prevents disclosure upon request (ie, reactive disclosure), but not to make more extensive changes. More extensive changes would require primary legislation, and that is not a practical option.

13 The challenge is therefore to find a way of amending the present wording of S28, using the FOI Act order-making power in such a way that achieves the Commission’s and Ministers’ policy objectives of removing all unnecessary barriers to openness – both in response to requests, and in situations where HSC/E want proactively to make information available because it is in the public interest to do so.

14 See Note 3 for the full text of the provisions of S28. Essentially, the present position is that unless the person who provided information (because they were required to⁸) has given their consent, such information can only be disclosed:

- in the circumstances provided for in section 28 – ie
 - for legal proceedings, or
 - for the purposes of functions concerned with health and safety (HSC’s, HSE’s, inspectors’, or others’ as specified in S28)⁹,
- or as otherwise permitted by law (eg, the Data Protection Act 1998, Anti-terrorism, Crime and Security Act 2001).

15 Note 4 sets out what we would like the amendment to do. One course of action may be to add new subsections to S28(3) and to S28(7) to provide for disclosure of information for the purposes of keeping persons informed

⁵ Revitalising Health and Safety, Action point 39

⁶ Lord Chancellor’s 2nd Annual Report on the FOI Act

⁷ Section 75 – for the full text, see Note 6 on the FOI Act

⁸ Essentially, Section 28 applies to two types of information:

- information provided in compliance with a statutory requirement (eg, RIDDOR reports, Safety Cases); and
- information obtained through exercise of powers to investigate (normally, under HSWA section 20)

⁹ For a disclosure to be lawful if done for the purposes of our functions, it must have a positive health and safety purpose. As the law stands, disclosure only for other, wider, ‘public interest’ reasons is not permitted.

NOTE 1

about health and safety, and to keep the rest of S28 largely as it is. However, the Department for Constitutional Affairs has final responsibility for making the change to Section 28, which it must do without exceeding the *vires* of the FOI Act, Section 75.

What practical effect will changing Section 28 have?

16 It is difficult to say. We believe that we do already provide as much S28 information as we can justify on the grounds that it is for the purpose of our functions. But others outside HSC/E may disagree. Our understanding of the law is that for a disclosure of S28 information to be for the purposes of our functions it should be clearly linked to the general purposes set out in Section 1 of the HSW Act¹⁰ and be expected to have some positive health and safety benefit. We are clear that the HSW Act does not give us the latitude to define our functions more widely, as some would have us do, in order to embrace wider public interest arguments.

17 The change to S28 will allow HSC/E to take account of wider public interest arguments. For instance, we recognise that there is a very strong public interest argument in favour of providing the bereaved families of people killed at work or by work activities with more information than we can at present. Clearly, it would require a very significant counter-argument that the public interest was in favour of maintaining the confidentiality of information which, in cases of non-fatal injury, we would provide to the injured persons themselves in accordance with the Data Protection Act 1998. Bringing S28 in line with the FOI Act would require us, before applying Exemptions in the FOI Act, to weigh the public interest in providing information against the public interest in withholding it.

18 Another situation where HSE at present cannot always release S28 information is in response to requests from former employees relating to their former employer.

19 At present, where it is necessary in order to keep workers or their representatives adequately informed about matters relating to their health, safety and welfare, S28(8) enables Inspectors to provide factual information relating to the premises or anything therein or being done therein; and information on any action the inspector has taken or proposes to take in connection with those premises.

20 However, since a former employee is no longer employed at the premises concerned, an Inspector would not be empowered by S28(8) to provide that former employee with information relating to their health, safety and welfare which that person would have had access to as an employee at the premises. Such information could be released to a former employee only for the purposes of legal proceedings (ie, civil proceedings) or if it was more

¹⁰ These are: (a) securing the health, safety and welfare of persons at work, and (b) protecting persons other than persons at work against risks to health and safety arising out of or in connection with the activities of persons at work.

NOTE 1

generally for the purposes of the Inspector's or HSE's functions (see para 15, above) and, arguably, this will not always be the case.

21 Once S28 has been brought in line with the FOI Act, it is difficult to see that there could be a presumption in favour of withholding such information from former employees on the basis that the public interest requires this.

22 We believe that for most other situations involving S28 information, however, there will not be a significant change in the amount of information we need to withhold after S28 has been brought in line with the FOI Act, compared with current practice. This is because we will still need to withhold information where significant harm would be caused.

How will HSE apply a ‘public interest’ test?

23 HSE’s openness policy¹¹ requires us, where we can legally do so, to release information on request unless we have concluded that significant harm would be caused. By applying this “significant harm” test, we take account of the clear presumption that it is in the public interest to make health and safety information widely available. The public interest in openness prevails unless there are stronger public interest arguments against releasing the information.

24 For the kinds of information HSE holds, the public interest arguments against releasing information are usually that disclosure could:

- prejudice the administration of justice (eg, a fair trial) or legal proceedings, or could prejudice our enforcement of the law, including prevention and investigation of offences and prosecution of offenders.
- harm our ability to discuss issues, express opinions or give advice frankly and candidly - internally or with other public or regulatory bodies or Government Departments.
- harm our information-gathering, if information-providers do not trust us to maintain confidentiality (commercial or private) where this is a legitimate expectation.

Where these harms are significant we do not release the information because we consider the public interest in avoiding the harms outweighs the public interest in making the information available.

25 These harms will still need to be considered when S28 has been brought in line with the FOI Act. And where HSE concludes that the public interest in providing the information is outweighed by the public interest in withholding it, we will apply the corresponding Exemptions available in the FOI Act.

¹¹ HSE’s policy, and that of the HSC, are to be replaced by a single joint policy. Until then, you can find the HSE policy at <http://www.hse.gov.uk/aboutus/hse/openness.htm> and the HSC policy at: <http://www.hse.gov.uk/aboutus/hsc/openness.htm> . The HSC has endorsed the HSE policy and agreed that it should take precedence where it requires greater openness than the older HSC policy.

NOTE 1

Won't the FOI Exemption relating to health and safety just take over from Section 28?

26 No. Although Section 38 of the FOI Act provides an exemption which specifically mentions health and safety, its purpose is to allow information to be withheld if its disclosure would, or would be likely to, endanger the physical or mental health of any individual. We do not expect this Exemption will be applicable to much Section 28 information held by HSC/E.