

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 03 June 2014

Public Authority: Food Standards Agency
Address: Aviation House
125 Kingsway
London WC2B 6NH

Decision (including any steps ordered)

1. The complainant has requested information relating to an alleged breach of animal welfare legislation at a specific establishment.
2. The Commissioner's decision is that the Food Standards Agency (FSA) has correctly applied section 31(1)(c). In addition, the Commissioner finds that the FSA has correctly applied section 40(1) and 40(2) of the FOIA.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 23 July 2013, the complainant wrote to the FSA and requested information in the following terms:

Request ref: FOI 1419

"Could you please supply me with every piece of information with regard to a serious breach of animal welfare reported by an official veterinarian to the pertinent authorities on 4th September 2012 at the establishment [redacted].

Could you particularly supply me with every piece of documentation with regard to the reasons why the above mentioned establishment was allowed to resume normal production on the same day when this serious breach of animal welfare was reported to the pertinent authorities?

This information would possibly be sourced from emails and official reports, communications and minutes of meetings involving FSA officials such as [redacted].

Please include copies of material which you hold in the form of paper and electronic records including emails."

5. On 8 September 2013 the complainant made a further request in the following terms:

Request ref: FOI 1441

"I would appreciate if you could please supply me with any evidence of complaint raised [redacted] following an incident occurred on 04/09/12 involving alleged breaches of animal welfare at this establishment. This complaint is likely to have been raised within two months following the date of the incident.

I would also greatly appreciate if you could inform me of, in the event of any complaint raised by [redacted], which course of action the Food Standards Agency followed.

Please include copies of material which you hold in the form of paper and electronic records including emails."

6. The FSA responded on 18 September 2013. With regard to FOI 1419, it refused to provide the requested information. It cited sections 31(1)(g) and 31(2)(c). It also cited sections 40(1) and 40(2) by virtue of section 42(3)(a)(i).
7. With regard to FOI 1441, the FSA considered that this was a repeated request as it was covered by the scope of request FOI 1419. It therefore applied section 14(2) of the FOIA to that request.
8. Following a request for an internal review the FSA wrote to the complainant on 14 November 2013 and upheld its original position. As it considered FOI 1441 was a repeat of FOI 1419 its review concentrated on the handling of FOI 1419.
9. Further information about the subject matter of the request is contained in a confidential annex at the end of the decision notice. This has not been made available to the complainant as it contains personal data about other parties involved.

Scope of the case

10. The complainant contacted the Commissioner on 27 January 2014 to complain about the way his request for information had been handled. The Commissioner has taken the same approach as the FSA in that his investigation of the complaint is in relation to request FOI 1419 made on 23 July 2013.
11. During the Commissioner's investigation the FSA also sought late reliance on section 43(2). The Commissioner considers the scope of this case to be to determine if the FSA has correctly applied the exemptions it has cited.

Reasons for decision

Section 31 - law enforcement

12. In its submissions, the FSA told the Commissioner that it was primarily relying on sections 31(1)(g) and 2(c) and 31(1)(c). It has applied section 31(1)(c) to all the withheld information and therefore the Commissioner has first considered the application of this exemption.

Section 31(1)(c)

"1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(c) the administration of justice,

13. The FSA considers that disclosure of the information about this incident would be likely to prejudice the administration of justice. It has applied this exemption to correspondence to staff at the FSA, minutes of a meeting and extracts from an investigation report. The FSA understands that, section 31(1)(c) refers to "justice" in a broad sense and it can protect a wide range of judicial bodies, including tribunals, from disclosures that would in any way interfere with their efficiency and effectiveness, or their ability to conduct proceedings fairly.
14. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activity mentioned in section 31(1)(c) - the administration of justice.

15. The complainant is involved in an employment tribunal and a hearing has been scheduled later this year. As the complainant's behaviour during the incident of 4 September 2012 is one of the central issues for the tribunal, the disclosure of the information would be likely to interfere with the ability of the employment tribunal to conduct proceedings fairly.
16. The Commissioner has next considered whether the FSA has demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(c) is designed to protect. In his view, disclosure must at least be capable of harming the interest in some way, ie, have a damaging or detrimental effect on it. Having considered what the content of the information suggests about the likelihood of prejudice, the Commissioner is satisfied that there is a causal link between disclosure of some of the disputed information and the prejudicial outcomes described above. He also agrees that this prejudicial outcome, where it might arise, would be of substance.
17. The FSA stated that the complainant's personal information has been withheld under section 40(1) of the FOI Act, disclosure of the information that is not his personal data would be selective and misleading.
18. The FSA considered that it would be unfair to the complainant and his former employer if only some of the information that is relevant to the proceedings was put into the public domain in advance of the hearing.
19. In addition, since the issue of animal welfare at slaughter is a highly emotive one for the public, there is a risk that disclosure of information related to animal welfare in a slaughterhouse could result in coverage of the issue by the media, which would be likely to prejudice the claimant's or respondent's ability to have a fair hearing.

Public interest arguments in favour of disclosure

20. The FSA acknowledges the public interest in transparency and openness about how the FSA, and staff acting on its behalf, carries out official controls in meat plants, to ensure adherence to food safety and animal welfare regulations. There is also an interest in disclosing information that promotes accountability of public authorities.
21. The complainant argued that this information is of high public interest. This information refers to the ability of the FSA to deal honestly and efficiently with breaches of animal welfare legislation within food processing establishments directly supervised by them. The public is entitled to scrutinise the activities of such a public body, particularly

with reference to its obligation to be the arbiters of animal welfare in British food processing establishments.

22. The complainant further stated that this information specifically refers to the actions and responses of the FSA in relation to an incident that occurred at a particular food establishment on 4 September 2012. There is no official response to this incident. The FSA has refused to make its response public.
23. In addition, the complainant argued that the topic of animal welfare is highly sensitive in our modern society and the public demands the highest standards when it comes to our obligations in this respect. Therefore an incident of this nature cannot be silenced by the very ones appointed to promote these standards.

Public interest arguments in favour of maintaining the exemption

24. Against disclosure, the FSA considers that it is in the public interest to ensure that the administration of justice is not prejudiced by disclosure of information that would be likely to form evidence in future proceedings. The public interest in the administration of justice is particularly strong in this case, with a hearing scheduled for August, and the FSA considers that this outweighs the public interest in disclosing the information.

Balance of the public interest.

25. The Commissioner acknowledges the complainant's arguments with regard to the general public interest in animal welfare. However, in relation to this specific exemption and, given that the complainant is involved in other proceedings, the Commissioner considers that disclosure of the withheld information would be likely to prejudice the administration of justice.
26. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
27. The weight given to arguments in favour of disclosure will depend both on the need for greater transparency, and any other arguments in favour of disclosure, and also the extent to which the information in question will meet those needs. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be

regarded as something which is in the public interest. He recognises that there will always be a general interest in transparency.

28. In this case the Commissioner recognises that there is a general public interest in disclosing information relating to animal welfare. This would aid public understanding of the FSA's role and would increase the public's ability to scrutinise how the FSA handles concerns raised with it.
29. While there is a general public interest in allowing greater scrutiny of an organisation's complaint handling process, the example of the complainant's experience does not add greater weight to that interest.
30. While the Commissioner understands the complainant's reasons for wanting access to the information held by the FSA, in reaching a decision in this case the Commissioner has to take into account issues of public interest not of private interest to the complainant. He must consider whether or not it is appropriate for the withheld information to be released to the general public.

Section 31(1)(c) – Conclusion

31. The Commissioner has carefully considered the arguments in favour of disclosing the information and those in favour of maintaining the exemption. He accepts that the public may be interested to know some of the finer details of the FSA's role. However, he finds that the need to avoid prejudice to the effectiveness of relationships between the different agencies involved in the administration of justice to be particularly compelling. He therefore concludes that the balance of the public interest in all the circumstances of this case lies in favour of maintaining the exemption at section 31(1)(c).

Section 40

32. In using exemptions provided under section 40, the FSA stated it had regard to the ICO guidance, and in particular: *Personal information (section 40 and regulation 13); Requests for personal data about public authority employees; Personal data of both the requester and others; Neither confirm nor deny in relation to personal data and; Access to information held in complaint files.*
33. The FSA has highlighted to the Commissioner the information that it considers is personal data. Some of the data is the personal data of more than one person because it reflects the views and opinions of one individual about another.
34. In response to the request, information that is the personal data of the applicant was refused under section 40(1) and provided to the applicant as a Subject Access Request (SAR) response on 3 October 2013. Some

further information that should have been identified as in scope of this request was subsequently located when the FSA responded to a further SAR request on 6 December 2013.

Section 40(1)

35. Under section 40(1) information that is requested that constitutes the applicant's 'personal data' is exempt information. This exemption is absolute and requires no public interest test to be conducted. In addition, in relation to such information public authorities are not obliged to comply with the obligation to confirm or deny whether they hold the requested information, by virtue of section 40(5)(a).
36. Some of the information that falls within the scope of this request relates to an issue raised by the complainant.
37. The Commissioner has issued detailed guidance on determining what information constitutes personal data¹. This guidance sets out several steps in establishing whether information is personal data, with the first step being whether an individual can be identified from the information and the second step being whether the information relates to the individual in some way, e.g. is it information which is obviously about a particular individual, is the information linked to an individual or is it information used to inform or influence actions or decisions affecting an identifiable individual.
38. The Commissioner has reviewed the information withheld under section 40(1) and is satisfied that the FSA has provided this in response to subject access requests made by the complainant.

Section 40(2)&(3)(a)(i)

39. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of a third party (ie someone other than the requester) and the conditions under either section 40(3) or 40(4) are also satisfied.
40. The Commissioner therefore first considered whether some of the requested information is the personal data of a third party.

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[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Detailed_specialist_guides/determining_what_is_personal_data_quick_reference_guide.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Data_Protection/Detailed_specialist_guides/determining_what_is_personal_data_quick_reference_guide.ashx)

41. The Data Protection Act (DPA) defines personal data as '*...data which relate to a living individual who can be identified... from those data and other information which is in the possession of...the data controller*'.
42. The Commissioner is satisfied that the individuals concerned could be identified if this information was released to the complainant, as he has previous knowledge of the individuals concerned. It therefore follows that the Commissioner is also satisfied that the requested information is the personal data of those individuals.
43. Having decided that the requested information is third party personal data, the Commissioner then turned his attention to the conditions under section 40(3).
44. The first condition under section 40(3)(a)(i) says that personal data is exempt from disclosure to a member of the public if doing so would contravene one of the data protection principles set out in Schedule 1 of the DPA.

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

45. The Commissioner considered whether the FSA was correct when it argued in its submission that disclosing the information would breach the first data protection principle.
46. The FSA stated that in all cases, the information relates to the individual's public life, either as a public official (FSA staff members) or in relation to their business (the staff members of meat plants).
47. The FSA consulted the ICO guidance, *Access to Information held in complaint files*, and notes the difficult judgements involved in determining whether an opinion *relates to* the person holding it.
48. In this case, the FSA considers that some of the information consists of statements of opinion where the opinion is a subjective, personal view, usually about the behaviour of other individuals and therefore is personal data and exempt under section 40(2).
49. The Commissioner has reviewed the withheld information and considers that it clearly relates to specific identifiable individuals.

50. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:
- What reasonable expectation do the individuals have about what will happen to their personal data?
 - Have the individuals given their consent to disclosure?
 - What might be the likely consequences resulting from disclosure?
51. Assessing fairness however, also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so. The Commissioner therefore also finally considered these interests.
52. Expectation: Whether a third party might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to the third party in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
53. The information in this case concerns individuals employed by the FSA as well as other individuals. Whilst there may be some expectation from employees to have their personal data disclosed, the employees in this case are relatively junior members of staff, so that expectation would be reduced.
54. Regarding the complaint against the Head of Operational Delivery for the South West, the FSA explained that this was investigated by a senior FSA employee with a view to ascertaining whether the individual should be subject to disciplinary action. Allegations of this type could impact the personal and professional life of the individual. In line with guidance set out by the ICO, the individual has the reasonable expectation that such information would not be disclosed.
55. Consent: The FSA stated that on this occasion it had not consulted one of the third parties about information provided. However, based on previous experience where it has consulted on two occasions in the last three years (2011 and earlier this year) with regard to requests for information made under the FOI Act the individual has objected to disclosure. In handling this request, as the FSA considered that the information was exempt from disclosure under section 31 the FSA chose not to consult.

56. The FSA further stated that it had not consulted with FSA staff in relation to comments made about other individuals involved.
57. Consequences of disclosure: Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.
58. In this case it is not just employees who are party to the withheld information. The Commissioner considers that disclosure of this information could potentially have adverse consequences on the non-FSA employees. Although there would be less potential for adverse consequences with regard to the employees, the Commissioner is satisfied that the potential is there.
59. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
60. Where information has been held for investigation purposes, either related to investigation of the incident of 4 September or in relation to the investigation into the formal complaint made by [redacted], the reasonable expectation of all the individuals is that such information is for the purposes of the investigation and not intended for wider public consumption. In the case of the investigation of the formal complaint, all witnesses were told that their statements might be disclosed to the subject of the complaint but were otherwise confidential. In the case of the formal witness statement made by [redacted], this was given on the understanding that it was confidential.
61. Legitimate interest in disclosure to the public: The FSA has considered whether any of the conditions in schedule 2 (specifically in the sixth condition) would allow the information to be disclosed, but does not consider that there are legitimate interests in disclosing the information sufficient to over-ride each affected individual's expectation that the information is personal data and should not be disclosed.

62. The Commissioner has reviewed the information withheld and is satisfied that it is personal data, and disclosure would be unfair on those individuals. As the Commissioner has determined that it would be unfair to disclose the requested personal information, it is not necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 is met. As section 40(2) is an absolute exemption, there is no need to consider the public interest in disclosure.
63. As the Commissioner is satisfied that all the withheld information is exempt by virtue of at least one of the above exemptions, he has not gone on to consider the FSA's late reliance on section 43(2).

Right of appeal

64. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.
66. 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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