

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2019

Public Authority: Animal and Plant Health Agency
Address: Weybourne Building
Ground Floor
Woodham Lane
New Haw
Addlestone
Surrey
KT15 3NB

Decision (including any steps ordered)

1. The complainant has requested information relating to breaches of free range egg definitions over a number of years. The Animal and Plant Health Agency (APHA) provided some information but refused to disclose the names of businesses on the basis of section 43 and 40 of the FOIA.
2. The Commissioner's decision is that the APHA has correctly applied the provisions of the section 43(2) exemption and the public interest favours maintaining the exemptions. She therefore requires no steps to be taken by the APHA.

Request and response

3. On 4 October 2018 the complainant made a request to the APHA in the following terms:

"Please could you provide all the information for the years 2018, 2017, 2016.

Please could answer the following:

- 1) *Working backwards from the most recent breach of free range egg definitions, please describe how the free range egg definition was broken in each case.*
- 2) *In each case, please also describe what action was taken to remedy the situation and how it was resolved?*
- 3) *Please could you describe how long it took each breach to be resolved in days?*
- 4) *Please could you provide the name of each business which broke free range egg regulations in each case?*
- 5) *If this is not possible, please could you provide the town and/or country where the business is based.*
- 6) *If the name of a business can't be provided, please give each business a separate number.*

Please provide your answers as a spreadsheet with the following columns:

Case number/case date (day/month/year)/reasons for case/Action taken to solve breach of free range egg definition/Time taken to solve case/Name of business/Business location (county)"

4. The APHA responded on 26 October 2018. For questions 1, 5 and 6 information was provided in answer to the questions with some explanatory text. For questions 2 and 3 the APHA stated it did not capture information as to what action was taken to bring operators into compliance or how long it took. For question 4 the information was exempted from disclosure under section 40 and 43 of the FOIA.
5. The complainant requested an internal review on 29 October 2018. In particular he asked the APHA to review its decision not to release the name of egg manufacturers who broke the definition of free range in their product and where the balance of the public interest was.
6. The APHA conducted an internal review and provided the outcome on 8 November 2018. It upheld its decision to refuse to disclose the names of persons/businesses which broke free range regulations under section 40 and 43 of the FOIA.
7. The complainant followed up with the APHA and asked the APHA to consider if it could release the names of businesses in certain areas where the complainant stated it was known there had been repeated contraventions. The APHA considered this and responded stating that it

still maintained this information could not be provided for the reasons set out in its internal review response.

Scope of the case

8. The complainant contacted the Commissioner on 19 December 2018 to complain about the way his request for information had been handled.
9. The APHA considers it has appropriately responded to the request as it asked for names of business (question 4) which was refused under section 40 and 43 but this question stated if this could not be provided then the complainant would accept the town where the business was based (question 5). The APHA did provide the information asked for in question 5.
10. The Commissioner notes that in the complainant's correspondence following the internal review he asked the APHA to provide the names of businesses in certain areas where the complainant stated it was known there had been repeated contraventions. These areas were Cheshire, North Yorkshire and Staffordshire and the complainant provided the relevant business numbers for these from the information supplied by the APHA.
11. The Commissioner acknowledges the wording of the request does suggest the APHA could provide the information asked for in question 5 (towns) as an alternative to the information requested at question 4 (names). That being said, the complainant still has a right to request the Commissioner consider the decision to refuse to provide the information requested at question 4 as it was withheld under the section 40 and 43 exemptions.
12. The Commissioner therefore considers the scope of her investigation to be to determine if the APHA has correctly withheld the names of persons/businesses which broke the free range egg definitions on the basis of either of the cited exemptions – section 40 or 43 – and not just those businesses the complainant narrowed his request down to after the internal review, but all business names withheld at question 4.

Reasons for decision

Section 43 – prejudice to commercial interests

13. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial

interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

14. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹

15. The information withheld under this exemption is the names of each business that broke free range egg regulations in 2016, 2017 and 2018.
16. APHA carry out risk based egg marketing inspections to ensure compliance with the appropriate legislation; the main legislation being the Eggs and Chicks Regulations 2009. The breaches recorded against these businesses related to hens on premises whose eggs were to be sold as 'free range'. In many cases when the inspections took place access to free range had either been restricted or denied and once bird access was granted the business was classified as free range.
17. The Commissioner considers that the information is commercial in nature as it is information on a specific business and breaches of legislation recorded against it. This is information relevant to a person's ability to participate competitively. The APHA has not argued that disclosing this information would be likely to prejudice its own commercial interests but considers it would be likely to prejudice the commercial interests of the businesses.
18. For the exemption to be engaged the APHA must be able to demonstrate that disclosing this information would be likely to have a prejudicial impact on the third party's commercial interests.
19. The APHA has consulted with some of the businesses, specifically the businesses referred to by the complainant in his further correspondence following the internal review. The Commissioner has viewed the correspondence with these businesses and it is clear they all have objections to disclosure relating to financial harm and damage to their

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

commercial reputations. There seems to be concern that if it were known that breaches of the egg regulations had occurred this would cause a loss of income from egg sales as the information that would be disclosed would not go on to clarify if these breaches had since been resolved.

20. In some cases the third parties have documented occasions when they have been targeted by animal rights protestors and there is genuine concern amongst the businesses that disclosure of this information would increase the risk of this happening again and have an impact on customers and suppliers engaging with the business.
21. For this reason the Commissioner would accept there is a real risk of prejudice to the third parties commercial interests through the disclosure. If it were made public that breaches had been recorded against businesses this could be misleading to the public as it may appear that the businesses are continuing to operate under breach of legislation when this may not be the case. There is a real risk of reputational damage from this disclosure and a consequential loss of customers and financial revenue.

Public interest arguments in favour of disclosure

22. The APHA recognises there is a general presumption in favour of transparency and openness concerning business names who have breached regulations. As a regulator APHA egg marketing inspectors hold business names of those who have breached regulations involving hens whose eggs were marked as free range but were being denied access to range. Disclosing this information may aid in public debates on the actual policy made by the Department for the Environment, Food and Rural Affairs and on the breach of the regulations made by the third parties.
23. The complainant argues that some of the businesses made repeated contraventions of the requirements for the production of free range eggs each year for the last three years suggesting they were ignoring the APHA's issuing of contraventions. The complainant considers, specifically in these cases, there is a public interest in the business names being released to assist in transparency and public understanding to allow for consumers to be correctly informed about free range eggs.

Public interest arguments in favour of maintaining the exemption

24. The APHA's arguments relating to the public interest in withholding the information are largely the same as those arguments explaining the likelihood of prejudice to the third parties.

Balance of the public interest arguments

25. The Commissioner accepts there is a public interest in disclosing information which increases transparency and allows for better scrutiny as to how a public authority operates. In this case, disclosing the names of the businesses would allow for better scrutiny as it would show which businesses had been subject to breaches of the regulations and the frequency of this. This would be in the public interest.
26. That being said, the Commissioner notes the APHA has disclosed the broad locations of the businesses (counties) and how the free range egg definitions were broken and this does go some way towards meeting the public interest as it shows that the APHA egg inspectors are performing their duties and following-up on breaches.
27. Both the complainant and the APHA have referred to the information being misleading in their submissions. The complainant considers non-disclosure is misleading as without the full information being available it is not possible to see if repeat offenders have taken appropriate action. The APHA considers disclosure would be misleading for the opposite reason – it would lead the public to believe businesses had not rectified non-conformance when they had. The APHA has explained to the Commissioner that non-compliance is dealt with at the time of the offence by the immediate release of birds or the eggs being down-graded to a lower production type and therefore the public have not been misled as appropriate action is taken. In other cases where a breach is recorded due to denial of access the APHA has explained that this is usually resolved quickly once access is allowed and the inspection can take place and free range classification given. As the information, if disclosed would not necessarily distinguish between these types of breaches it could be misleading.
28. On the basis of this the Commissioner is minded to accept that disclosing the business names is likely to be misleading as it would not necessarily show the whole picture; it could lead to conclusions being drawn when these are not the full account of what happened during an inspection. The risk of commercial damage to the businesses as a result of this is significant and this would not be in the public interest.
29. The Commissioner also acknowledges that if there is a likelihood of prejudice to the commercial interests of these businesses then there will also be weight to the argument that disclosure would affect their ability to continue operating. Added to this are the genuine safety concerns arising from previous incidents of businesses being targeted by protestors and she does not consider there are sufficient public interest arguments in favour of disclosure that outweigh that in this case.
30. The Commissioner therefore finds the balance of the public interest favours withholding the information.

Right of appeal

31. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

32. 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.
33. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF