



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0009
Information Commissioners Ref: FS50089403

Freedom of Information Act 2000

Heard at Harp House on 6 July 2007
and on the papers on 18 September 2007

Decision Promulgated: 14/11/2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Anisa Dhanji

and

LAY MEMBERS

Suzanne Cosgrave and Dave Sivers

BETWEEN

ROY BENFORD

and

Appellant

THE INFORMATION COMMISSIONER

and

Respondent

THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Additional Party

Representation (on 6 July 2007):

For the Appellant:	In person
For the Respondent:	Mr. Akhlaq Choudrey, Counsel
For the Additional Party:	Ms Jemima Stratford, Counsel

FREEDOM OF INFORMATION ACT 2000

SUBSTITUTED DECISION NOTICE

8 November, 2007

Name of Public authority: Department for Environment, Food and Rural Affairs

Address of Public authority: Nobel House, 17 Smith Square, London SW1P 6JR

Name of Complainant: Mr Roy Benford

Nature of Complaint:

The Public Authority had not complied with the Freedom of Information Act 2000 in relation to the Complainant's request for the details of egg producers corresponding with the Farm ID marked on eggs.

Date of Decision Notice Substituted:

20 December 2006.

Action Required:

Within 20 working days from the date of promulgation of the Tribunal's determination, the Public Authority must communicate to the Complainant the following information in relation to egg producers registered with the Public Authority:

- Farm ID numbers (described on the list of egg producers provided to the Tribunal as "Reg No"); and
- In respect of each Farm ID number, elements of the Premises Address as follows:
 - Place name unless it is a small town or village (less than approximately 10,000 people)
 - County
 - Outbound post code

For the avoidance of doubt, the Farm ID number does not include the prefix number indicating the farming method. That is not within the scope of the complainant's request and may give rise to issues not considered in the Tribunal's determination.

Signed

Date

8 November 2007

Anisa Dhanji

Deputy Chairman

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Benford (“the Appellant”), against a Decision Notice issued by the Information Commissioner (“the Commissioner”), dated 20 December 2006. The Decision Notice relates to a request for information made by the Appellant to the Department for Environment, Food and Rural Affairs (“Defra”) under the Freedom of Information Act 2000 (“FOIA”).

The Request for Information

2. On 7 April 2005, the Appellant sent an email to the Egg Marketing Inspectorate (“EMI”), which forms part of Defra, asking where Defra publishes the Farm ID that is printed on eggs.
3. On 8 April 2005, EMI replied. They said that a list of registered producers of eggs, could not be published for *“reasons associated with the security of personal information about individuals and the premises that are involved in the production and marketing of eggs”*.
4. The Appellant wrote again on 12 April 2005. He explained that his interest, as a consumer, was to identify local produce. He did not agree that Defra could not publish a list of egg producers. He argued that egg producers are businesses and not private individuals, and hence are not covered by the “personal information” exemption in FOIA.
5. Further emails then passed between the Appellant and EMI. On 21 June 2005, EMI explained that *“a considerable number of producers, packers and other businesses listed by us are individuals and we have new [sic] been required to separate out those individuals from companies and have no means of doing so as a result”*. EMI offered to produce a list of *“producers and packers registration numbers and the county in which they lie”* in an attempt to provide the Appellant with a correlation between the codes seen on eggs and his local area, without compromise to the individuals’ identities or their premises which they said must *“be protected from the unfortunate possibility of animal rights or other attack and theft”*. By an email dated 22 June 2005, the Appellant accepted EMI’s offer as *“a good compromise”*.
6. However, the Appellant did not receive the information offered by EMI. In an e mail dated 15 July 2005, he asked EMI when the information would be available. EMI did not reply. On the same day, the Appellant raised the matter with Lord Bach, the Minister for Sustainable Food and Farming. On 4 August 2005, Defra replied on behalf of the Minister. They stated, amongst other things, that the provision of producer details was controlled by the Data Protection Act 1998 (“DPA”), and that they were investigating how they might be able to provide further information to consumers without breaching any confidentiality.
7. On guidance from the Commissioner’s office, the Appellant then requested Defra to conduct an internal review of its decision. Defra said that it would reply by 2 December. On 1 December, they said they would reply by 4 January 2006, and on

4 January 2006, they said they would reply by 1 February. They did reply on 1 February, stating that the information the Appellant had requested had been correctly withheld. Although they acknowledged that they had not previously identified any specific exemptions under FOIA, they were in fact relying on the exemptions in sections 38 (health and safety) and 43(2) (prejudice to commercial interest). They also said that it was likely, in the case of some egg producers, that the information requested would be personal information, although in the present case, the information was being withheld under sections 38 and 43(2), and not because it was personal information.

The Complaint to the Information Commissioner

8. On 5 February 2006, the Appellant made a complaint to the Information Commissioner that Defra had failed to provide him with the information he had requested. He also set out why he did not agree with Defra's position as regards sections 38 and 43(2).
9. The Commissioner undertook inquiries. During the course of these inquiries, Defra stated that it had been willing to handle the Appellant's enquiries pragmatically outside the requirements of FOIA, but had not received a response to their offer of 21 June 2005. The Appellant provided evidence to the Commissioner that in fact, he had responded by email on 22 June 2005. He said that he had received no acknowledgement to that e mail, nor to his reminder email of 15 July 2005. He was no longer prepared to accept such a compromise.
10. Following his inquiries, the Commissioner issued a Decision Notice dated 20 December 2006 setting out the following findings:
 - Section 17: Defra was in breach of section 17 of FOIA because they had not identified the exemptions on which they were relying until 1 February 2006, considerably after the 20 working days required by FOIA for public authorities to respond to requests for information.
 - Section 38: Defra had provided details of a number of incidents to illustrate situations in which activists had threatened or had committed violence against egg producers. There was a real possibility that the release of the list of egg producers would put the individuals and organisations listed at risk. Therefore, the section 38 exemption was engaged in relation to the businesses whose names and addresses appeared on the list, although disclosure of information relating to individuals was more appropriately dealt with under section 40. As regards the public interest test in relation to section 38, the release of the information would make it much easier for the locations of egg producers to be established by animal rights extremists. Although there was a strong public interest in the origin of food, given the real risk to the health and safety of those producers and their staff, the public interest was better served by maintaining the exemption.
 - Section 40: Defra had incorrectly cited the DPA. Disclosure of personal information about third parties falls to be considered under section 40 of FOIA. The list of egg producers included names and addresses of individuals who had not given their consent to the release of that information. Releasing the

information would not constitute fair and lawful processing and would breach the first data protection principle. Therefore, the information should be withheld. Since section 40 provides an absolute exemption, no public interest considerations apply.

- Section 43(2): Given the conclusions as regards sections 38 and 40, there was no need to consider section 43(2).

11. For the above reasons, the Commissioner upheld Defra's decision to withhold the information. However, the Commissioner welcomed Defra's agreement as set out in their letter dated 21 June 2005, to provide the Appellant with a list identifying the counties of origin of producer farm registration numbers which the Appellant had previously indicated would meet his purpose.

The Appeal to the Tribunal

12. By a Notice of Appeal dated 10 January 2007, the Appellant appealed to the Tribunal against the Decision Notice. The grounds of appeal state that:
 - No evidence has been provided to justify Defra's claim that extremists are targeting egg producers. The Appellant disagrees, therefore, with the Commissioner's findings that section 38 is engaged and that the public interest lies in maintaining that exemption;
 - The Commissioner was wrong to consider the exemption in section 40 when this had not been specifically claimed by Defra;
 - The Appellant does not accept the Commissioner's decision "that if the name and address is both personal and business that the personal attribute overrides all other considerations"; and
 - Defra has already released similar information about farmers under FOIA.
13. The Appellant has not pursued the last point, nor submitted evidence in support of it, so we consider this ground of appeal to have been abandoned.

The Tribunal's Jurisdiction

14. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
15. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Evidence and Submissions

16. We have considered all the documents, written submissions and witness statements received from the parties (even if not specifically referred to in this determination), including in particular, the documents contained in the agreed bundle of documents, as well as the documentary evidence submitted at the hearing on 6 July 2007.
17. The Tribunal has also been provided with an excerpt from the list which Defra holds of egg producers (“the List”). However, this has been kept confidential from the Appellant since to disclose it to him would of course defeat the purpose of this Appeal.
18. A few weeks prior to the hearing, Defra informed the Tribunal and the other parties that it had become clear that the information sought by the Appellant was held by Defra for the purposes of an investigation which may lead to a decision to institute criminal proceedings. Defra sought directions in order to serve closed evidence and closed submissions in relation to the details of the case under investigation and how the publication of the information sought by the Appellant would increase the risk of fraud. The Tribunal made the necessary directions and closed evidence was submitted in the form of a witness statement from Richard Jones, although Defra did not put forward any closed written submissions.
19. On the basis of this new issue, Defra invoked two additional exemptions, namely, sections 30 (investigations and proceedings conducted by public authorities), and 31 (law enforcement). When we set out our findings (below), we will address whether Defra can rely on these exemptions at the appeal stage when it had not relied on them previously.

The Appeal Hearing

20. The Tribunal had directed that the parties should lodge written submissions rather than skeleton arguments so that the appeal could be determined entirely on the papers, if appropriate. After considering the evidence that had been lodged, the Tribunal considered that the issues raised would better be addressed in an oral hearing, and accordingly directed that there should be an oral hearing, notwithstanding that Defra and the Commissioner considered that the appeal could be determined entirely on the papers.
21. At the oral hearing, the Tribunal heard evidence from two witnesses on behalf of Defra, namely, Richard Jones, the Deputy Chief Marketing Inspector of EMI, who adopted his open and closed statements (both undated), and Maria Ball, the Chief Poultry Adviser of the National Farmer’s Union (“NFU”), who adopted her statement of 7 June 2007. Both were examined and cross-examined. Pursuant to the directions referred to in paragraph 18, some of Mr. Jones’ evidence was heard in a closed session.
22. The Appellant also submitted a witness statement which stood as his evidence in chief, to the extent it related to matters within his knowledge or belief. To the extent

that it consisted of what may more properly be described as submissions, we have considered it as such.

23. We will refer to the relevant aspects of the evidence from the three witnesses, below, together with our findings. However, some of the evidence, in particular the evidence of Ms Ball, deals with matters which for reasons we explain in paragraphs 66 and 67, are no longer of any real relevance to this appeal.
24. The Tribunal also heard submissions on certain issues from the Appellant, from Counsel for the Commissioner and Counsel for Defra.
25. During the latter part of the day during the oral hearing on 6 July 2007, Defra and the Appellant appeared to reach agreement that Defra would provide the Appellant with information which, although not fully responding to his request, he would consider satisfactory. On this basis, the hearing was adjourned part-heard. The Appellant was directed to inform the Tribunal by 24 July 2007 whether he had received the information and was satisfied with it. However, the Appellant informed the Tribunal that he wished to continue with the appeal.
26. The Tribunal reconvened on 19 September. Having already heard oral evidence and submissions on what the Tribunal considered to be the key issues, the hearing on 19 September was on the papers. There was no objection from any party to this. However, Defra applied to submit additional written submissions. The Tribunal refused the application on the basis that the parties had already had a full opportunity to make written submissions, and indeed had done so on the basis that the appeal may have been determined entirely on the papers.

Findings

The Information

27. Before addressing whether the information contained in the List is exempt under FOIA, it may be helpful to set out briefly what information the List contains and how it relates to the Appellant's request.
28. As noted in paragraph 2 above, when the Appellant made his request, he asked where Defra published the Farm ID that is printed on eggs. In subsequent communications it became clear that what he was asking for was information as to where the egg producers corresponding with the Farm ID numbers are located.
29. The information printed on eggs is governed by EU legislation which require, amongst other things, that class A eggs (which as Mr Jones explains in his open statement, are eggs sold in retail outlets and used in general catering), must be marked with the distinguishing number of the producer, consisting of the numbers and letters specified in Directive 2002/4/EC.
30. We have before us a copy of the inside of an ordinary box of eggs which contains a helpful explanation of the numbers and letters that are printed on eggs. The first number indicates the farming method as follows:

O=Organic

1=Free Range
 2=Barn
 3=Cage

Next come letters indicating the country of origin. The five numbers that follow are the Farm ID (which Defra sometimes refers to as the “producer code”). So for example, where an egg is printed with 1UK12345, the number “1” indicates that it is a free range egg, the letters “UK” indicate that the country of origin is the UK, and the numbers “12345” constitute the Farm ID. The Farm ID corresponds to the name and address of a particular egg producer.

31. The List which Defra has provided to the Tribunal is current as at August 2005 and covers all egg producers then registered with Defra. Defra did not retain the list current as at the date of the Appellant’s request, (which clearly it should have done), but says that there would not have been significant changes. While the contents of the List cannot be set out in this determination, it may be helpful to describe in generic terms, the information it contains.
32. The List is set out in three columns:
- The first column, headed “Reg No”, lists the Farm ID, but prefixed with “UK” to indicate the country of origin. However, the first number denoting the method of production is missing. For reasons that are not quite clear to us, that number was omitted from the List provided to the Tribunal.
 - The second column, headed “Premises Name”, lists the egg producers’ names. Some are clearly companies because the name includes the word “Limited”. Where “Limited” does not appear, it is not apparent, except in a few cases, whether the names are those of individuals, companies, sole traders, partnerships or other entities.
 - The third column, headed “Premises Address”, lists addresses, corresponding to the information in the first two columns.
33. The evidence is that with limited exceptions, the name and address of the egg producer corresponding to a given Farm ID is not printed on egg boxes or other packaging, and the information is not provided or available to consumers in any other way. Accordingly, this is not a case where the information requested by the Appellant is accessible to him by other means.

Is the information in the List exempt from the disclosure requirements in FOIA?

34. We turn now to consider whether the information in the List is exempt from the disclosure requirements in FOIA.
35. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information. Under section 2, the duty on the public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA.

36. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of public interest considerations.
37. Defra has invoked the exemptions contained in sections 30, 31, 38, 40 and 43(2). The Appellant says that Defra cannot rely on section 40 because initially, they invoked the Data Protection Act 1998 (“DPA”) rather than FOIA. In our view, there is no merit in this point. While Defra may have referred to the wrong legislation, it is clear that they were asserting that the information was exempt from disclosure because it contained personal data. There has been no prejudice to the Appellant arising from this, and we have no reservations in finding that Defra can invoke section 40.
38. However, sections 30 and 31 have been invoked by Defra only at the appeal stage. In its Reply (at paragraph 29), Defra says that following developments in the investigations it is conducting together with the police into suspected mislabelling in relation to the marketing of eggs, it is now clear that the information sought by the Appellant is held for the purposes of its investigation.
39. Defra has said in its Reply, that *“it is well established that the Tribunal is entitled and indeed obliged to consider any exemption claimed, even if it is claimed for the first time by the Tribunal”*. Defra cites the Tribunal’s decision in **Bowbrick (EA/2006/0016)** in support of this proposition. However, we do not consider that that case purported to lay down such a principle. In that case, the Tribunal decided (at paragraphs 34-57), that a public authority which had failed to identify a particular FOIA exemption until after there had been a complaint to the Commissioner or an appeal to the Tribunal, was not thereby prevented from relying on that exemption (albeit that the failure to identify the exemption when first responding to the request would be a breach of the procedural requirements). There however, the information requested was only discovered after the appeal process had begun. It is difficult to see how any exemption could have been claimed at an earlier stage. In our view, the principle that emerges from **Bowbrick** and other cases (for example, **Kircaldie (EA/2006/001)** and **Archer (EA/2006/0037)**), in respect of situations where a party seeks to invoke, on appeal, an exemption not relied on previously, is that each case must be considered on its own facts. In the present case, Defra has said that the circumstances justifying its reliance on sections 30 and 31 only arose at the appeal stage. Bearing this in mind and that the Appellant has not been prejudiced because he has had an opportunity, before this Tribunal, to make submissions in respect of these exemptions, we find that Defra can rely on sections 30 and 31 in this appeal.
40. It follows that we need to address all the exemptions invoked, namely sections 30, 31, 38, 40 and 43(2). Section 40 (insofar as it applies in this case), is the only one that is an absolute exemption. The rest are qualified exemptions. Logically, therefore, the first question for the Tribunal to consider is whether the information is exempt under section 40. If it is, then since section 40 is an absolute exemption, it may not be necessary to go any further. If, or to the extent that the information is

not exempt under section 40, we must then consider whether it is exempt under any other sections relied on.

Section 40

41. To the extent that it is relevant, section 40 provides as follows:

40. Personal information

(1) *Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

(2) *Any information to which a request for information relates is also exempt information if—*

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) *The first condition is—*

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) *The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).*

42. Section 40(1) concerns a request for personal data relating to the applicant himself. Such information is exempt under FOIA because access is dealt with under the DPA. Section 40(2) concerns a request for personal data of third parties. Such

information is dealt with under FOIA. Defra says that the information in the List constitutes "*personal data*", that disclosure would contravene the first data protection principle (fair and lawful processing) set out in Schedule 1 to the DPA, and that therefore, pursuant to section 40(3)(a)(i), the information is exempt from the disclosure requirements in FOIA.

43. It is clear that if and to the extent that the information in the List is "*personal data*", disclosure would contravene the first data protection principle and therefore, the information would be exempt under section 40(2). The question we must consider is whether the information in the List is in fact "*personal data*". If it is not, then section 40 does not apply.
44. FOIA incorporates the definition of "*personal data*" found in section 1(1) the DPA which is as follows:

"personal data" means data which relate to a living individual who can be identified—

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;*

45. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data ("the 1995 Directive"), and this has bearing on how the DPA should be interpreted. In **Campbell v. MGN [2002] EWCA Civ 1373, [2003] QB 633**, the Court of Appeal expressed it in this way:

"In interpreting the Act it is appropriate to look to the Directive for assistance. The Act should, if possible, be interpreted in a manner that is consistent with the Directive. Furthermore, because the Act has, in large measure, adopted the wording of the Directive, it is not appropriate to look for the precision in the use of language that is usually to be expected from the parliamentary draftsman. A purposive approach to making sense of the provisions is called for."

46. Article 2(a) of the 1995 Directive defines "*personal data*" as follows:

"... any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;"

47. With these definitions in mind, we turn to the question of whether the information in the List is "*personal data*". We have described in paragraph 32 what information is contained in the List. All the information is clearly "*data*". What makes data "*personal*" within the meaning of the DPA and the 1995 Directive, is whether living individuals can be identified from it. As others have noted before, that is not always a straightforward question.
48. In the present case, the first column in the List gives the country of origin and Farm ID number for individual egg producers. That by itself does not identify anyone. The issues arise when that information is combined with second and/or third columns (ie Premises Name and/or Premises Address).
49. The Commissioner considered that the information in the List is personal data in the case of those egg producers who are individuals, but not where the producers are businesses. We have some reservations about whether this is an entirely helpful distinction on the facts of this case since some business names on the List may largely comprise the business owner's name. For example, a producer listed as Joe Bloggs (Poultry) Ltd may well be a business owned by Mr Joe Bloggs, and therefore it may be personal data as much as if the producer was listed as Joe Bloggs. The name combined with the Farm ID number (without which the List is of no interest to the Appellant), identifies Joe Bloggs as an egg producer and is therefore clearly personal data.
50. We are also concerned as to whether in the List, individuals can in fact be distinguished from businesses. Defra say that they have never before needed to draw this distinction and are not able to do so. Some of the names in the column headed "Premises Name", clearly relate to companies, because the names includes the word "Limited". Defra say however that this is the case for only 249 out of a total of over 2,600 egg producers. They also say that in their experience, many egg producers are in fact sole traders and therefore, many of the names on the List will be names of individuals. We accept that the List does not lend itself to distinguishing between egg producers who are individuals and egg producers which are business entities, and that the List contains many names of individuals.
51. Does the Farm ID combined with the "Premises Address" also constitute personal data? In most cases, the addresses on the List give no indication as to whether they are residential or business addresses. Defra say that it is likely that many will be the personal addresses of the egg producers and that they cannot distinguish between personal and business addresses. We will revert to this issue in paragraph 52 below. However, to the extent that an address is that of an egg producer's residence, it is clearly data which relates to a living individual. Section 1(1) of the DPA refers to living individuals "*who can be identified*" from the data while the 1995 Directive refers to "... *an identified or identifiable natural person*". Some commentators consider that the definition in the Directive is wider, but it is clear from both that for data to be "*personal*", it does not have to itself identify a living individual. Data is "*personal*" if a living individual can be identified from it, and he can be identified even if his name is not known. On this basis, a residential address combined with a Farm ID identifying the person at that address as an egg producer is, in our view, clearly "*personal data*".

52. As already noted, Defra has said that it cannot distinguish, on the List, whether the producer is an individual or a business, and whether the address is the residential address of an individual egg producer or a business address. That is not the end of the matter. It is sometimes easy to lose sight of the fact that FOIA is concerned with access to information, rather than access to the documents containing the information. When considering whether information should be disclosed, the focus must be on the information itself, rather than on where or how it is recorded. Thus far, we have considered only the List and not the source of the information that is used by Defra to compile the List, and whether, leaving aside for the moment, any issues under section 12, the Appellant's request can be met from that source information. This issue does not appear to have been considered by the Commissioner nor by Defra, and consequently, the evidence before us in this regard is not as helpful as it could have been.
53. What the evidence does tell us is that pursuant to the Establishments (Laying Hens) (England) Regulations 2003, implementing Commission Directive 2002/4/EC of 30 January 2002, any site (described as "establishments"), keeping 350 or more laying hens, must be registered, and the Secretary of State must maintain a register of such establishments. That responsibility is fulfilled by Defra. Registration involves completing a form headed "Application for Registration of an Egg Production Establishment (Production Site)". We have before us a blank example of the form. As far as names and addresses are concerned, Section A calls for those completing the forms to give their name and correspondence address, and then to provide the name and address of the establishment to which they wish the registration to apply if different from the previous address. Section B of the form (headed "Owner's Details"), asks for the name and address of the owner if different from the above. Therefore, comparing the establishment address in section A with the owner's address in section B may show whether the address is a personal address or an establishment address, although it is less helpful where both addresses are the same.
54. The Appellant points out, quite rightly in our view, that the form is intended to provide Defra with the information to maintain a register of egg laying "establishments", not the personal addresses of the "owners". However, as the Appellant acknowledges in his witness statement, the design of the form does not focus on the egg laying establishment, and we are not at all satisfied from the evidence before us that when inputting information on to its data base, Defra has been rigorous in distinguishing between the establishment address and the other addresses on the form.
55. Does the duty on public authorities under FOIA mean that Defra must go through each form to see where the establishment address differs from the other addresses and to provide those addresses at least (with accompanying Farm ID number) to the Appellant? This would not be creating new information; it would simply be extracting information already contained in the forms held by Defra. However, there are two difficulties with this. First, Defra say that in many cases the establishment address and the owner's address will be the same because many owners or their staff live on site. Second, section 12 of FOIA excuses a public authority from complying with a request if the cost of doing so exceeds the limits set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees)

Regulations 2004). For a government department, the appropriate limit is £600. Under Regulation 4(4), the time cost is to be calculated at a rate of £25 per person per hour which allows for 24 hours of time before the £600 limit is reached. Defra says that it has over 2,600 registrations. We have had no indication that Defra has made any estimate of the cost of complying with the request on that basis. However, since to come within the £600 limit would require 108 files to be reviewed per hour, there are clearly difficulties in requiring Defra to undertake such an exercise.

56. We also do not consider that on the facts of this case, it is necessary to go that far. It is important not to lose sight of exactly what information has been requested. The Appellant made a request for information as to where Defra publishes the Farm ID that is printed on eggs. Defra does not publish that information and informed the Appellant of this. In doing so, they indicated that they have a list which links Farm IDs with the individual producers. From then on, attention seems to have been focused almost entirely on the List even though the Appellant did not originally ask for the List, and indeed it is clear he was not aware of exactly what information the List contained. There appears to have been no real discussion by Defra with the Appellant as to what information he was seeking. What he has said, however, including in his response to Defra's offer in June 2005, indicates that what he was and is principally concerned about, is information as to where the egg producers corresponding with the Farm ID numbers are located, not the full address of the egg laying establishments (much less of the egg producers themselves).
57. We consider that the List can be redacted quite easily to provide the Appellant with information which would largely satisfy his request without the risk of disclosing personal data. Clearly not all the data on the List is "*personal data*". The Farm ID number is not. As we have found, the Farm ID number combined with the name or the full address, will, in many cases, amount to personal data. However, part of the address can be given without that being sufficient to identify any living individual. So for example, in an address made up of [farm name], [road], [place], [county], [out bound post code (ie the first half of the post code)] and [inbound post code (ie the second half of the post code)], the farm name, the road and the inbound post code may constitute "*personal data*", but the county and outbound post code would clearly not. Whether the place name combined with the other information is "*personal data*" may depend on whether the place is a small village where people can be easily identified by their occupation, or a large town where that would be unlikely.
58. There can be no argument that producing a redacted list would amount to the creation of new information by Defra, outside the scope of its obligations under FOIA. It is clear that Defra holds the List in computerised form and the redaction required is likely to involve a very modest amount of time and skill. As explained in the Tribunal's decision in **Johnson (EA/2006/0085)**, in particular at paragraphs 41-50, the need to do something to the information (here to redact the personal data) does not mean that it is not held by Defra and not subject to the disclosure requirements in section 1 of FOIA.
59. Before Defra can be required to provide a redacted form of the List (the "Redacted List") to the Appellant, we must consider whether the other exemptions that Defra relies on, apply. We said at paragraph 40 above, that if section 40 applies, since it

is an absolute exemption, it may not be necessary to go further to consider whether the information is also exempt under the other sections relied on. We have found that certain information in the List is personal data and is exempt, but that the information in the proposed Redacted List is not. The other exemptions therefore need to be considered in the context of the Redacted List, and the question therefore is whether the information in the Redacted List would be exempt under sections 31, 32, 38 and/or 43(2). On this basis, many of Defra's objections under these sections fall away.

Section 30

60. Defra relies on section 30(1)(b) under which information is exempt if it has, at any time, been held by the public authority for the purposes of an investigation conducted by the authority which may lead to a decision by the authority to institute criminal proceedings.
61. We do not find that this exemption is engaged. The exemption is concerned with information that is held for the purposes of such investigation. The information in question here is held for the purposes of complying with a statutory duty to maintain a register of egg producers. Although the information may be used for other purposes as well, including for an investigation, it is not held for that purpose. Even if we are wrong about this, having considered the contents of Mr Jones' closed statement, we do not see how it can be said that the information that would be contained in the Redacted List is held for the purposes of the case currently under investigation.

Section 31

62. Section 31 can only apply to information which is not exempt under section 30. Defra has therefore invoked section 31 as an alternative to section 30.
63. Insofar as it is relevant, section 31 provides as follows:
- (1) Information ... is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
- (a) the prevention or detection of crime,*
- (b) the apprehension or prosecution of offenders,*
- (c) the administration of justice,*
- ...
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*
- (2) The purposes referred to in subsection (1)(g) to (i) are—*

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

...

64. Defra has not said which sub-paragraph of section 31(1) it is relying on. In its Reply, it has reproduced sub-paragraphs (a), (b), (c) and (g), but simply says that a number of sub-paragraphs of section 31(1) may be applicable. Section 17(1)(b) requires the public authority to specify the exemption in question and there must be some doubt as to whether Defra has done so. Defra has also made very limited submissions as to how section 31 applies. In its written submissions, it refers to its Reply and to certain paragraphs in Mr Jones' two statements. Defra does not elaborate on its position regarding section 31, except to say that for the reasons it has explained in the closed evidence, disclosure "*would or would be likely to*" make fraudulent mislabelling of eggs more likely to occur and more difficult to detect and prosecute. The Commissioner's submissions on section 31 are likewise very brief, although we do not criticise him for that. This exemption was invoked by Defra after the Decision Notice was issued and the Commissioner has not had a proper opportunity to explore the basis of Defra's claim in this regard.
65. The closed evidence describes how frauds as regards mislabelling of eggs occur and then describes the particular case currently under investigation. We asked Mr Jones some further questions in this regard at the hearing. We find, first, that the evidence before us does not support a finding that it is the possession of Farm ID numbers that facilitates the fraud. In any event, Farm ID numbers can be obtained from eggs on sale throughout the country. There is nothing in the combination of Farm ID numbers and location as would be contained in the Redacted List that changes this position. Even if we are wrong about this, we find that whatever prejudice such disclosure might have on the matters set out in the above sub-paragraphs, the evidence does not support a finding that it would meet the "*would or would be likely to*" test. In short, we do not find that section 31 is engaged. The public interest considerations do not therefore arise.

Section 38

66. Section 38 is engaged where the disclosure would or would be likely to endanger the physical or mental health of any individual or endanger the safety of any individual. Whatever concerns there may have been about the risk from animal rights activists in the event of disclosure of the List, fall away since what is now in issue is the information in the Redacted List. There can be no credible concern that the Redacted List would engage section 38.

Section 43(2)

67. Section 43(2) is engaged where disclosure would or would be likely to prejudice the commercial interest of any person. This was always the weaker of the arguments that have been put forward. Because of its other findings, the Commissioner did not deal with this exemption at all in its Decision Notice. Subsequent submissions from Defra and the Commissioner have shown, at best, a tenuous connection between section 43(2) and disclosure of the List. Such connection has gone no further than the risk from animal rights activists relied on in connection with section 38. Once again, such risk does not arise in connection with the Redacted List, and accordingly we find that this exemption, too, is not engaged.

Decision

68. For the reasons set out above, we find that the only applicable exemption is section 40 of FOIA. We find that if certain information is redacted from the List as set out in paragraph 57, the remaining information does not come within the scope of that exemption.
69. We allow this appeal to the extent that we direct that Defra provide a Redacted List to the Appellant within 20 working days from the promulgation of this determination.
70. The finding in the Commissioner's Decision Notice that Defra was in breach of section 17 of FOIA remains unaltered.
71. For the reasons set out in paragraph 56, Defra may also be in breach of section 16. However, we make no specific findings in this regard since this issue was not raised by the Appellant and has not been addressed by Defra or by the Commissioner.

Signed

Date 8 November 2007

Anisa Dhanji

Deputy Chairman