

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 December 2010

Public Authority: Food Standards Agency
Address: Aviation House
Room 2C
125 Kingsway
London
WC2B 6NH

Summary

The complainant made a request to the Food Standards Agency (the "FSA") for a copy of an updated Annex 1 which had been referred to but withheld within an alert notification dated 15 December 2008 published by the FSA. The alert was issued by the FSA in response to an alert sent to it under the Rapid Alert System for the notification of a direct risk to human health deriving from food or feed (RASFF). The FSA refused to disclose this information upon reliance of the exemptions contained at section 27(2), 43(2) and 44(1)(b) of the Freedom of Information Act 2000 (the "Act"). In relation to its application of the exemption contained at section 44(1)(b) of the Act, the FSA stated that disclosure of the requested information was incompatible with a Community obligation, that being European Food Safety Authority by specific Community legislation Regulation (EC) No. 178/2002 (the "Regulation")¹. The Commissioner considers that the section 44(1)(b) exemption is applicable in this case and therefore did not go on to consider the FSA's application of the exemptions contained at sections 27(2) or 43(2) any further.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:031:0001:0001:EN:PDF>

Information Act. This Notice sets out his decision.

The Request

2. The complainant made a request to the FSA on 17 December 2008. The complainant asked the FSA to provide the following information:

"Specifically, I wish to have a copy of updated 'Annexe 1' that is referred to under the heading 'Action to be taken by local authorities' on the FSA website. This annexe is identified under the reference – 'Ref: 74/2008 (Update 2)' – and was published on the FSA website on Monday, December 15. The web address of the page is –

[Web address provided]

The original version of 'Annexe 1' was published by the FSA on its website on December 9, 2008, under the reference Ref: 74/2008 (Update 1)'..."

The complainant also provided a description of the type of information that was contained on the earlier version labelled 'Update 1' and published on 9 December 2009.

3. On 19 January 2009 the FSA responded to the request for information. It confirmed that it held the updated Annex 1 dated 15 December 2008. The FSA applied the exemption contained at section 44(1)(b) of the Act and stated that the information could not be disclosed as disclosure would be incompatible with a Community obligation. It explained that disclosure would be incompatible with the obligations set out in Article 52 of Regulation (EC) 178/2002.
4. As the complainant was dissatisfied with the response he had received he asked the FSA to conduct an internal review.
5. On 16 February 2009 the FSA wrote to the complainant with the result of the internal review it had carried out. The FSA upheld its application of the exemption contained at section 44(1)(b) of the Act. The FSA also applied the exemption contained at section 27(2) which exempts confidential information obtained from a State other than the United Kingdom or from an international organisation or an international court. Finally it applied the exemption contained at section 43(2) of the Act which relates to the prejudice of commercial interests. As section 27(2) and 43(2) are qualified

exemptions the FSA considered the public interest in maintaining each of these exemptions outweighed the public interest in disclosure. It concluded that the public interest favoured maintaining each of the exemptions.

The Investigation

Scope of the case

6. On 17 February 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether or not the exemptions contained at sections 27(2), 43(2) and 44(1)(b) of the Act had been correctly applied in this case.
7. Upon receiving the complaint the Commissioner considered whether the information requested could be classed as environmental information and therefore whether it should be dealt with under the Environmental Information Regulations 2004. The Commissioner does not believe that the information could be classed as environmental information in this case as it is considered that that contamination of the food chain arose through the manufacturing process rather than environmental factors.
8. The Commissioner has therefore gone on to conduct his investigation on the exemptions applied by the FSA under the Act.

Chronology

9. On 8 July 2009 the Commissioner contacted the FSA and asked it to provide him with a copy of the withheld information for the purposes of his investigation. The Commissioner also asked the FSA to provide him with any further arguments in support of its application of the exemptions contained at section 27(2), 43(2) and 44(1)(b) of the Act.
10. On 5 August 2009 the FSA responded to the Commissioner. The FSA provided the Commissioner with a copy of the withheld information. The FSA provided the Commissioner with its further arguments in relation to its application of the exemptions contained at section 27(2), 43(2) and 44(1)(b) of

the Act.

11. On 24 September 2009 the Commissioner wrote to the FSA to gain further clarification in relation to its application of the exemption contained at section 44(1)(b) of the Act.
12. On 29 October 2009 the FSA responded to the Commissioner in relation to his further questions surrounding its application of section 44(1)(b) of the Act.
13. Further correspondence took place between the FSA and the Commissioner between December 2009 and February 2010 seeking clarification of the application of section 44(1)(b).

Analysis

Exemptions

Section 44

14. Section 44(1) provides that:

Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,*
- (b) is incompatible with any Community obligation, or*
- (c) would constitute or be punishable as a contempt of court.*

The full text of section 44 is set out within the Legal Annex at the end of this Notice.

15. In this case the FSA relied upon section 44(1)(b) that disclosure of the requested information is incompatible with a Community obligation.
16. The Commissioner will determine whether section 44(1)(b) is applicable in this case. To determine whether section 44(1)(b) of the Act is applicable in this case the Commissioner has considered the submissions provided by the FSA on 5 August 2009, 29 October 2009, 15 January 2010 and 4 February 2010.

17. As stated above the relevant Community obligation is the Regulation. The Commissioner notes that Article 10 of the Regulation states that:

Without prejudice to the applicable provisions of Community and national law on access to documents, where there are reasonable grounds to suspect that a food or feed may present a risk for human or animal health, then, depending on the nature, seriousness and extent of that risk, public authorities shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or feed, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk.

18. The Commissioner also notes that Article 52, Section 1, Chapter IV of the Regulation states that:

1. Information, available to the members of the network, relating to a risk to human health posed by food and feed shall in general be available to the public in accordance with the information principle provided for in Article 10. In general, the public shall have access to information on product identification, the nature of the risk and the measure taken.

However, the members of the network shall take steps to ensure that members of their staff are required not to disclose information obtained for the purposes of this Section [Section 1 which relates to the Rapid Alert Notification System] which by its nature is covered by professional secrecy in duly justified cases, except for information which must be made public, if circumstances so require, in order to protect human health.

19. Finally the Commissioner has also noted Article 50, Section 1, Chapter IV of the Regulations states that:

1. A rapid alert system for the notification of a direct or indirect risk to human health deriving from food or feed is hereby established as a network. It shall involve the Member States, the Commission and the Authority. The Member States, the Commission and the Authority shall each designate a contact point, which shall be a

member of the network. The Commission shall be responsible for managing the network.

2. Where a member of the network has any information relating to the existence of a serious direct or indirect risk to human health deriving from food or feed, this information shall be immediately notified to the Commission under the rapid alert system. The Commission shall transmit this information immediately to the members of the network.

20. In this case the Commissioner will therefore determine whether the information requested was obtained under the rapid alert system described at Article 50. The Commissioner will then go on to determine whether it was reasonable for the FSA to decide that it was duly justified to claim that the information by its nature was covered by professional secrecy. The Commissioner will also consider article 10; whether the public needed to be informed about the nature of the risk to human health.
21. In this scenario, considering a Community obligation, under section 44 of the Act the Commissioner is considering the issue in terms of a public law challenge. This issue was considered in *BECTU v the Information Commissioner and Ofcom (EA/2009/067)*. The Tribunal found that: *"the Information Tribunal, and for that matter the Information Commissioner, does have the power to entertain a public law challengethe test we should apply is that set out in Hoyte, namely Wednesbury unreasonableness, irrationality or perversity."* The approach the Commissioner needs to take here is therefore different to the public interest test under section 2 of the Act, which is a full merits review of fact and law, where the Commissioner can substitute his view for that of the public authority.
22. The FSA explained that the information used to produce the document withheld from the complainant was information circulated by the European Commission to all Member States in a series of alert notifications using the Rapid Alert System for Food and Feed (RASFF) on 7, 8, 10, 12 and 15 December 2008. It stated that some of the information contained within these notifications was published by the FSA on its website in its own alerts dated 9, 11 and 15 December. In relation to the alerts dated 9 and 11 December there was a document called Annex 1 attached. However in relation to the alert of 15 December 2008 the updated version of Annex 1 was not

attached and this is the information the complainant wishes to obtain. The updated Annex 1 is a list of affected meat processors in the Republic of Ireland and a list of companies in the United Kingdom in receipt of products from those affected processors. Although the updated Annex 1 was not attached to the alert of 15 December 2008, the alert did state that this annex had been circulated to UK local authorities by dedicated FSA mailboxes at environmental health departments, the Chartered Institute of Environmental Health service known as EHCnet and the Trading Standards Service known as TS Interlink.

23. The FSA explained that the RASFF was established under Article 50 as a network involving Member States, the European Commission and the European Food Safety Authority under the Regulation. It clarified that Article 52 of the regulation covered the disclosure of information from the RASFF system.
24. The FSA explained that supply chain information received under the RASFF system is generally considered across the European Community to be covered by 'professional secrecy'.
25. Upon considering the FSA's submissions and the legislation set out above, the Commissioner considers that the information was obtained under the rapid alert system described at Article 50.
26. The next stage is for the Commissioner to consider whether it was reasonable for the FSA to decide that the information was covered by professional secrecy, in a duly justified case. The Commissioner has considered what is meant by the term professional secrecy and has noted the FSA's submissions of 24 October 2009.
27. The FSA argue that in the context of food law, the term professional secrecy is used in Regulation (EC) 882/2004 *on official controls performed to ensure the verification of compliance with feed and food law, animal health, and animal welfare laws*². Article 7.3 provides a non-exhaustive list and specifically refers to documents covered by "*an exception in Regulation (EC) No. 1049/2001 Regarding public access to European Parliament Council and Commission documents*"³. The Commissioner notes that relevant exceptions in article 4 of that regulation would be:

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R0882:20060525:EN:PDF>

³ http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property,

....

— the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

The Commissioner also accepts the relevance of Article 287 of the EC Treaty:

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components

28. The FSA submissions also drew parallels with other regulatory provisions that protect confidential information, under the Data Protection Act 1998 and the Financial Services and Markets Act 2000. The Commissioner accepts these are reasonable parallels to draw.
29. The FSA's letter of 24 October provided the Commissioner with persuasive arguments as to why it was duly justified that the information in question was covered by professional secrecy. These arguments explained the potential impact on the businesses in question, as it would identify their competitors and calculate the level of their competitors' business with the supplier thereby gaining an unfair commercial advantage. The FSA also provided convincing arguments about how "*confidentiality and professional secrecy were enshrined in the basic operating system of the RASFF. It constitutes an essential guarantee of protection in the freedom of exchange of information*". In terms of considering the exceptions in regulation 1049/2001 the Commissioner considers that there would not be an overriding public interest in disclosure, noting the analysis below about article 10.
30. Having considered the FSA's arguments and content of the information the Commissioner has concluded that it was reasonable for FSA to maintain that the professional secrecy

was duly justified.

31. He has therefore gone on to consider whether it was reasonable for the FSA to not to disclose the requested information to inform the public about a risk to health.
32. The FSA went on to explain that where there are reasonable grounds to suspect that a food or feed may present a risk for human or animal health, Article 10 of the Regulation requires public authorities to *"take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or feed, the risk that it may present and the measures taken to prevent, reduce or eliminate that risk. The steps taken are always dependent on the nature, seriousness and extent of the identified risk"*.
33. It then went on to explain that Article 52 of the regulation recognises that information relating to a risk to human health posed by food and feed should, in general, be available to the public in accordance with the information principle provided for in Article 10. It describes that availability as being access to information on product identification, the nature of the risk and the measures taken.
34. The FSA explained that the situation when dealing with an incident under the RASFF system can change rapidly. In this particular case circumstances were changing on an hourly basis, and new information was being received by the FSA through the RASFF on an almost daily basis. It clarified that the fact that circumstances in food incidents can change hourly is reflected in the timescales set by the FSA's 'Incident Response Protocol'. For example there are requirements to produce summaries of incident management meetings within one hour of the meeting and to provide daily briefings to FSA management and other organisations the Agency is working with on progress in managing an incident. The FSA directed the Commissioner to the appropriate section of this Protocol in which this is set out.
35. It explained that in the period between 9 and 11 December 2008, which were the first two days of a major EU food incident, it was considered that the disclosure of the company names in the meat supply chain was justified to protect human health. With the passage of time, and the opportunity for the industry and local authorities to act, the balance of the public interest in disclosure changed. The FSA confirmed that on 15 December 2008, whilst it had not disclosed the withheld

updated Annex 1 publicly, it had provided it to enforcement authorities so that they could contact the companies concerned and ensure affected products were identified and disposed of appropriately in order to protect human health. In addition it explained that the use of the information contained within the withheld updated Annex 1 was of little practical use to consumers as it did not identify the products sold by high street retailers and therefore could not use it to identify products on retailers shelves.

36. The FSA concluded therefore that its considered view was that it was not necessary to disclose the updated Annex 1 on 15 December 2008 to the public, taking into account the advice that had already been issued up to 15 December 2008 about the nature of the risk, the range of affected products and the measures that had been taken by 15 December 2008 to withdraw the affected products.
37. Taking into account all of the arguments submitted by the FSA the Commissioner considers that it took into account a broad range of factors and circumstances when it made the decision on 15 December 2008 that it was a reasonable decision not to disclose publicly the updated Annex 1. For example it took into account the information that had been publicly provided previously, the information that was still publicly available at that time, the information that was still being provided to relevant bodies and organisations, the measures that had been put into place to deal with the issue and the range of affected products. Having considered all the submissions presented by the FSA and the fact that it had to reach a decision on an extremely fast moving incident the Commissioner is satisfied that it was reasonable for the FSA to conclude that it was not duly justified to make the updated Annex 1 publicly available on 15 December 2008 and that disclosure was no longer necessary for the protection of human health.
38. The Commissioner therefore considers that when the request for the updated Annex 1 was made on 17 December 2008, the section 44(1)(b) statutory bar was applicable. This is because he is satisfied that disclosure of the requested information is incompatible with a Community obligation, the Community obligation in this case is the Regulation.
39. As the Commissioner has concluded that section 44(1)(b) has been correctly applied he has not gone on to consider the application of sections 27(2) or 43(2) of the Act.

The Decision

40. The Commissioner's decision is that the FSA dealt with the request for information in accordance with the Act by correctly applying section 44(1)(b) of the Act.

Steps Required

41. The Commissioner requires no steps to be taken.

Right of Appeal

42. 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
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 7th day of December 2010

Signed

Steve Wood
Head of Policy Delivery

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Prohibitions on disclosure.

Section 44(1) provides that –
“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Section 44(2) provides that –
“The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”