

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 February 2011

Public Authority: Department of Agriculture and Rural
Development
Address: Dundonald House
Upper Newtownards Road
Belfast
BT4 3SB

Summary

The complainant requested information relating to a judicial review of a decision by the Department of Agriculture and Rural Development ("DARD"). DARD provided the complainant with some of the requested information; however it refused to disclose legal advice in reliance upon the exemption at section 42(1) of the Act. The Commissioner finds that the section 42(1) exemption is engaged in relation to the entirety of the withheld information and that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. The Commissioner also finds that DARD breached section 10(1) of the Act in its handling of the complainant's request as it failed to comply with its obligations under section 1(1)(a) within the statutory time for compliance. The Commissioner does not require any steps to be taken.

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 Information Act 2000 (the Act). This Notice sets out his decision.

Background

2. The Veterinary Service Veterinary Public Health Unit (VS-VPHU) is a unit within the Department of Agriculture and Rural Development (DARD). VS-VPHU carries out a supervisory, inspection and enforcement role on behalf of the Food Standards Agency Northern Ireland (FSANI) in respect of licensed meat premises.
3. This case relates to an alleged failure on the part of the complainant to comply with the Food Hygiene Regulations (Northern Ireland) 2006 which relate to the slaughter of animals for food. Article 8 of the Food Safety (Northern Ireland) Order 1991 provides that a Justice of the Peace (JP) may condemn food if it has not been handled in accordance with the relevant food safety requirements. In this case VS-VPHU applied to a JP to request that a Condemnation Order be issued in respect of meat produced by the complainant. The complainant subsequently brought an application for judicial review of DARD's actions in this matter.

The Request

4. The Commissioner notes that the complaint under section 50 of the Act was submitted on the complainant's behalf by its representative. For clarity, the Commissioner has referred to 'the complainant' throughout this Notice.
5. On 24 November 2009 the complainant submitted the following request to DARD:

"We write pursuant to the Freedom of Information Act 2000 and ask that you provide the following information and documentation within the statutory time frame or sooner.

1. All communications whether in documentary or electronic form, which passed between the FSA and Jean Wales of the Department of Agriculture and Rural Development in June, July and August 2009.
2. All documents relating to the animal by-products enforcement regime produced by the FSA and shared with DARD in 2008 and 2009.

3. All advice, guidance and memoranda (including e-mail communications) relating to the propriety of using Article 8 of the Food Safety (Northern Ireland) Order 1991 which passed between FSA and DARD in 2009.
4. All notes of consultations which took place between Jean Wales of DARD and the FSA in June 2009.
5. All advice which was provided by the FSA to DARD in relation to the selection of an alternative Justice of the Peace in relation to the Article 8 Condemnation Order proceedings brought by DARD against McKeown Fine Foods Limited in June 2009.
6. A copy of all papers arising out of internal discussions which took place with the FSA in June and July 2009 in relation to the use of the animal by-products legislation as an alternative to Article 8 of the Food Safety (Northern Ireland) Order 1991.
7. A copy of the e-mail message sent by FSA to Jean Wales of DARD on 30 July 2009.

If any of these materials relate to advice provided by a professional lawyer they may attract legal professional privilege. FSA can waive privilege and provide these documents in an unredacted form. If it decides not to do so then please furnish these documents in a redacted form which conceals only those portions which encompass advice received from a qualified legal professional."

6. On 27 November 2009 DARD wrote to the complainant seeking clarification of its request. DARD advised that it held a large amount of information which potentially fell within the scope of part 1 of the request, and therefore a fee may be applicable if the complainant sought access to all of that information. On 2 December 2009 the complainant provided clarification to DARD and effectively narrowed the scope of part 1 of the request.
7. On 23 December 2009 DARD issued a refusal notice to the complainant in respect of some of the requested information, citing the exemption under section 42(1) of the Act (legal professional privilege). DARD did provide the complainant with some of the requested information, namely information relating to parts 1, 4 and 7 of the request. DARD redacted some personal details from the information provided, citing section 40(2) of the Act (personal data of third parties) as a basis for doing so.

8. On 5 January 2010 the complainant wrote to DARD with a number of queries relating to its response. Specifically the complainant asked DARD to confirm what information it was withholding, and what information it did not hold. In relation to the withheld information the complainant asked DARD to specify how the withheld information attracted legal professional privilege.
9. DARD responded to the complainant on 19 January 2010. DARD confirmed that it did not hold any information in relation to parts 2 and 6 of the request. DARD explained that the information withheld under section 42 comprised advice provided by legal representatives in relation to the application for judicial review brought by the complainant.
10. On 1 February 2010 the complainant requested an internal review of DARD's decision to withhold some of the requested information. The complainant was of the view that DARD's reasons for refusing the request had been inadequately explained. The complainant also argued that DARD ought to have indicated what specific information was being withheld.
11. DARD wrote to the complainant on 24 February 2010 with the outcome of the review. The review clarified that the information requested under parts 2 and 6 of the complainant's request was not in fact held by DARD. The review upheld DARD's original decision to withhold information under section 42(1) of the Act, and clarified that this was the information requested under Points 3 and 5 of the request.

The Investigation

Scope of the case

12. On 4 March 2010 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - DARD's application of the exemption under section 42(1) of the Act to the withheld information
 - The way in which DARD carried out the public interest test as set out in section 2(2) of the Act
13. The complainant did not have any issue with the information withheld under section 40(2). The complainant also had no issue with DARD's

claim that it did not hold the information requested at parts 2 and 6 of the request.

Chronology

14. On 14 April 2010 the Commissioner contacted DARD to request a copy of the withheld information. This was provided by DARD on 19 April 2010.
15. Following a review of the case, on 3 December 2010 the Commissioner asked DARD whether it would be prepared to release some of the withheld information to the complainant. DARD accepted the Commissioner's recommendation and released this part of the withheld information to the complainant on 7 December 2010. Therefore the Commissioner's decision in this case relates solely to the remaining information withheld under section 42(1).

Findings of fact

16. The withheld information, other than that which DARD has released to the complainant by way of informal resolution, consists of legal documents relating to the judicial review process, correspondence between DARD and its legal advisors and correspondence between DARD and third parties who are relevant to the process.

Analysis

Legislation

17. The Commissioner notes that DARD handled the complainant's request under the provisions of the Act. Given the circumstances and the subject matter in question, the Commissioner has considered whether or not the request should have been dealt with under the EIR.
18. "Environmental information" is defined at regulation 2 of the EIR. In order to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) – (f) of the EIR (see the Legal Annex). It must be definable as 'information on' any of the subjects covered by those six sub-sections.
19. For example, regulation 2(1)(f) refers to information on "*the state of human health and safety, including the contamination of the food chain...*". Given that the subject matter of the request in this case deals with issues relating to food hygiene and the contamination of part of the food chain, it would seem at first glance that the request

falls fairly comfortably within the confines of the EIR. However, in the Commissioner's view, matters are not necessarily so straightforward.

20. In coming to a view in any given case, on what can be a very difficult area of definition, the Commissioner believes that the correct approach is to examine the information in question and its relationship, if any, to regulations 2(1)(a) to (f): in effect, is the information held definable as information **on** one of the matters set out in that part of the EIR? In this context, the Commissioner is also of the view that a relatively broad approach should be taken. The Commissioner has followed the approach he adopted in a previous decision involving the Department for Environment, Food and Rural Affairs (DEFRA) dated 9 April 2008.¹
21. In this case, the subject matter of the requested information is essentially how DARD reached its decision to apply Article 8 of the Food Safety (Northern Ireland) Order 1991 to the situation whereby the complainant allegedly failed to comply with regulations regarding the slaughter of animals. The withheld information, ie the legal advice, contains views, advice and guidance as to the propriety of applying Article 8 in this instance. While, therefore, the context of these papers is clearly an environmental one, the actual matter under discussion (the application of legislation to an issue and the engagement of a JP) is not). An entirely similar discussion could easily have taken place in relation to other matters that were clearly outside the definition of 'environmental information' altogether. Therefore, the Commissioner considers that the withheld information does not constitute information on one of the matters set out in regulations 2(1)(a) to (f) of the EIR.

Can the withheld information be linked back to regulation 2(1)(a)?

22. As stated above, the actual withheld information does not constitute information on the state of the environment: it deals with the propriety and legality of applying certain legislation in relation to a situation that has arisen that happens to be an environmental one. However, the Commissioner's approach in such a case is to determine whether the withheld information can be linked back to regulation 2(1)(a), either directly or through regulations 2(1)(b) and 2(1)(c).
23. Regulation 2(1)(f) provides that information on "the state of human health and safety, including the contamination of the food chain where relevant, conditions of human life, cultural sites and built structures" is environmental information "inasmuch as they are or may be affected

¹ FS50105954

by the state of the elements of the environment referred to in (a) or, through those elements by any of the matters referred to in (b) and (c)”

24. The Commissioner’s view is that “may be affected” denotes a lower threshold of likelihood. So there must be some likelihood of the state of human health and safety being affected by the elements of the environment but this likelihood need not be substantially more than remote.
25. Under regulation 2(1)(f) it is not sufficient for information to be on the state of human health and safety it must be on the state of human health and safety *as affected by the state of the elements of the environment*. This may be a direct effect or via a relevant factor, measure or activity. The elements in regulation 2(1)(a) must ultimately affect those things in regulation 2(1)(f).
26. The Commissioner does not believe that the withheld information is on the state of human health and safety as affected by the state of the elements of the environment. The complainant’s request relates to contamination of part of the food chain. However, the withheld information consists of legal advice regarding the application of specific legislation where such contamination occurs. This is unlikely to be a situation where human health and safety is affected by any of the elements of the environment. Therefore, the Commissioner is not satisfied that the withheld information can be linked directly back to regulation 2(1)(a).
27. The Commissioner has considered whether the withheld information can be linked back indirectly to regulation 2(1)(a) through regulations 2(1)(b) or (c). It appears possible that the information could be linked back through regulation 2(1)(c), as it relates to legislation. However, the Commissioner does not consider that the contamination of part of the food chain, to which the legal advice and guidance contained in the withheld information relates, is affected by failure to comply with legislation or any policies or plans which affect or are likely to affect the elements of the environment.
28. The Commissioner is not, therefore, satisfied that the withheld information is information on one of the matters set out in regulations 2(1)(a) to (f) of the EIR. Further, he is not satisfied that the withheld information can be either directly or indirectly linked back to regulation 2(1)(a). Therefore, the Commissioner has concluded that the withheld information is not environmental information.

Exemptions

Section 42(1) – legal professional privilege

29. The full text of section 42(1) is available in the Legal Annex at the end of this Notice. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023; 4 April 2006) as:

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third] parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (para. 9)

30. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.
31. DARD has specified to the Commissioner that it believes some of the withheld information to attract advice privilege and the remainder to attract litigation privilege. Therefore the Commissioner has considered each provision in turn.

Advice privilege

32. Legal advice privilege attaches to communications between a client and its legal advisers, and any part of a document which provides evidence of the substance of such a communication. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice from a lawyer to a colleague on a line management issue will not attract privilege.
33. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact which can usually be found by inspecting the documents themselves.

34. The Commissioner's view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is also capable of attracting LPP. However, this is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information.
35. Some of the withheld information clearly consists of legal advice from a lawyer at the Departmental Solicitor's Office (the DSO) to a DARD official and information seeking and discussing that advice. The advice in question relates both to DARD's attempt to obtain a Condemnation Order in respect of meat produced by the complainant, and the ensuing application for judicial review. The Commissioner is therefore satisfied that this portion of the withheld information attracts legal advice privilege and the exemption provided by section 42(1) of the Act is therefore engaged.

Litigation privilege

36. The Commissioner considers that litigation privilege may only be claimed in respect of certain limited communications that meet the following requirements:
 - (i) Litigation is pending or in contemplation
 - (ii) The communication is made between the appropriate parties
 - (iii) The dominant purpose for the creation of the documents/information was to assist in the litigation

Litigation is pending or in contemplation

37. The Commissioner's view is that the appropriate test for deciding on the degree of likelihood of litigation is whether or not there was a reasonable prospect (not just a fear or possibility) of litigation at the time of the creation of the information in question.
38. Having inspected this part of the withheld information, it is clear to the Commissioner that this information was created during the legal action which arose from DARD's application for a Condemnation Order, which was followed by the judicial review process. Therefore the Commissioner is satisfied that litigation, i.e. the judicial review application, was ongoing at the time of the request, and the first test is met.

The communication is made between the appropriate parties

39. In considering who the appropriate parties are, the Commissioner accepts that litigation privilege is not limited to communications between lawyer and client, and can be extended to relevant third parties. In this case the Commissioner has ascertained that the information believed to attract litigation privilege does not consist of communications between lawyer and client. However, the Commissioner is satisfied that the communications were made between relevant and appropriate parties, ie DARD officials and others involved in preparing for the legal action.

Dominant purpose

40. Having considered the information, the Commissioner accepts that the dominant purpose of that information is to assist in the preparation of documents for the ongoing legal action. This is because it is clear to the Commissioner that the information consists entirely of documents of which the main purpose is to assist in preparation for that process.
41. In light of the above the Commissioner is satisfied that the information is subject to litigation privilege and that therefore the section 42(1) exemption is engaged in relation to that part of the withheld information.

The public interest test

42. Section 2 of the Act sets out the circumstances under which a public authority may refuse a request for information (see Legal Annex). According to this section, where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often referred to as the "*public interest test*".

Public interest arguments in favour of disclosing the withheld information

43. The complainant argued to the Commissioner that there is a strong public interest in ensuring the transparency of those in government and that there is a duty of candour on the part of public servants.
44. DARD had accepted these arguments and also put forward some of its own arguments in favour of disclosing the withheld information:

- a. There is a public interest in the need to ensure that public policy is applied consistently and fairly.
- b. There is a need for public accountability of administrators and to provide assurance to the public of the competence of public sector officials.
- c. There is a need to assure the public that procedures within DARD are carried out in an unbiased manner.

Public interest arguments in favour of maintaining the exemption

45. DARD put forward the following arguments in favour of maintaining the exemption:
 - a. Disclosure of the withheld information could inhibit openness in communications between client and lawyer which is necessary in order to obtain full and frank legal advice. The obtaining of such advice is in turn fundamental to the administration of justice.
 - b. The legal proceedings to which the withheld information pertains were ongoing at the time of the request.
 - c. It is in the wider public interest that DARD can take decisions in light of legal advice based on the full disclosure of facts to its advisers. Disclosure of the withheld information could impede the openness of future exchanges, thereby undermining the decision-making process.

Balance of the public interest arguments

46. In the Commissioner's opinion there is generally a strong public interest in understanding the reasons for decisions made by public authorities. He also accepts that there is a public interest in the disclosure of information that would inform public debate about actions that have been or are being taken by public authorities and which impact upon the delivery of their services to the public.
47. The Commissioner accepts that disclosure of the withheld information in this case would assist the public's understanding of DARD's approach to food safety legislation in relation to the slaughter of animals for food. This is an important issue relating to public health, therefore it is arguable that the public should be able to see why DARD made a particular decision in applying the relevant legislation

48. In terms of informing the public, the Commissioner is aware that copies of written judgements in relation to judicial review cases are freely available to the general public via the Northern Ireland Court Service website. The Commissioner notes that the resulting judgment will be made publicly accessible, and the Commissioner considers that this will sufficiently inform the public debate about DARD's decisions in relation to this case.

49. In addition, the Commissioner also accepts that the established public interest arguments in protecting LPP will always have significant weight. This is because of the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice, which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court Case of *DBERR v Dermot O'Brien* [2009] EWHC 164 (QB) who said:

"Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)... The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (para 53)

50. In this particular case the Commissioner considers that the timing of the request adds weight in favour of maintaining the exemption, as the litigation was ongoing at the time of the request. This meant that the withheld information was live and being actively relied upon by DARD to inform its decisions.

51. When considering the balance of the public interest arguments the Commissioner is assisted by the Tribunal's comments in *FCO v Information Commissioner* (EA/2007/0092):

"What sort of public interest is likely to undermine the maintenance of this privilege? There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it obtained."(paragraph 29)

52. It has not been suggested that DARD is misrepresenting or ignoring the advice it has received. Furthermore, the Commissioner has already indicated that he considers the arguments in favour of maintaining

section 42(1) in this instance have substantial weight. Therefore, although he accepts that, in this case, the arguments in favour of disclosure are deserving of some limited weight, he is not persuaded that they are sufficient to outweigh the significant arguments in favour of maintaining the exemption. When balancing the arguments on either side he has also noted the Tribunal's comments in *FCO*:

"the interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go. Disclosure of privileged opinions is not a substitute for legal aid." (paragraph 30)

53. In view of the above the Commissioner has concluded that the public interest in maintaining the section 42(1) exemption outweighs the public interest in disclosing the information.

Procedural requirements

54. Section 1(1) of the Act states that:

"Any person making a request for information to a public authority is entitled –
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him."

55. The Commissioner has considered whether DARD has complied with section 1(1)(a) of the Act.
56. The complainant initially requested the information on 24 November 2009. DARD responded to the request on 23 December 2009. On this date DARD failed to clarify that it did not hold information relating to parts 2 and 6 of the complainant's request.
57. As DARD confirmed that the information in parts 2 and 6 was not held in an e-mail to the complainant dated 19 January 2010, prior to the internal review, the Commissioner considers that it complied with section 1(1)(a) of the Act in its handling of this request.

Section 10(1)

58. Section 10(1) of the Act requires that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt of the request.
59. The Commissioner considers that DARD did not confirm that some of the information was not held under section 1(1)(a) of the Act within 20 working days of the date of the request.
60. As DARD did not comply with section 1(1)(a) within 20 working days the Commissioner considers that it breached section 10(1) of the Act.

The Decision

61. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, but for a breach of section 10(1) by failing to comply in full within the statutory time limit.

Steps Required

62. The Commissioner requires no steps to be taken.

Right of Appeal

63. 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

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.

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 17th day of February 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds

information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Public interest test

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Legal professional privilege

Section 42(1) provides that: -

Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

Environmental Information Regulations 2004

2. (1) In these Regulations-

" environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among those elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural life and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Food Safety (Northern Ireland) Order 1991

Inspection and seizure of suspected food

- 8.—(1)** An authorised officer may at all reasonable times inspect any food intended for human consumption which—
- (a) has been sold or is offered or exposed for sale; or
 - (b) is in the possession of, or has been deposited with or consigned to, any person for the purpose of sale or of preparation for sale;
- and paragraphs (3) to (9) shall apply where, on such an inspection, it appears to the authorised officer that any food fails to comply with food safety requirements.
- (2)** The following provisions shall also apply where, otherwise than on such an inspection, it appears to an authorised

officer that any food is likely to cause food poisoning or any disease communicable to human beings.

- (3) The authorised officer may either—
- (a) give notice to the person in charge of the food that, until the notice is withdrawn, the food or any specified portion of it—
 - (i) is not to be used for human consumption; and
 - (ii) either is not to be removed or is not to be removed except to some place specified in the notice; or
 - (b) seize the food and remove it in order to have it dealt with by a justice of the peace;
- and any person who knowingly contravenes the requirements of a notice under sub-paragraph (a) shall be guilty of an offence.
- (4) Where the authorised officer gives notice under paragraph (3)(a), he shall, as soon as is reasonably practicable and in any event before the expiration of 21 days from the date of the notice, determine whether or not he is satisfied that the food complies with food safety requirements and—
- (a) if he is so satisfied, shall forthwith withdraw the notice;
 - (b) if he is not so satisfied, shall seize the food and remove it in order to have it dealt with by a justice of the peace.
- (5) Where an authorised officer seizes and removes food under paragraph (3)(b) or (4)(b), he shall inform the person in charge of the food of his intention to have it dealt with by a justice of the peace and—
- (a) any person who under Article 6 or 7 might be liable to a prosecution in respect of the food shall, if he attends before the justice of the peace by whom the food falls to be dealt with, be entitled to be heard and to call witnesses; and
 - (b) that justice of the peace may, but need not, be a member of the court before which any person is charged with an offence under that Article in relation to that food.
- (6) If it appears to a justice of the peace, on the basis of such evidence as he considers appropriate in the circumstances, that any food falling to be dealt with by him under this Article fails to comply with food safety requirements, he shall condemn the food and order—
- (a) the food to be destroyed or to be so disposed of as to prevent it from being used for human consumption; and
 - (b) any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the food.

- (7) If a notice under paragraph (3)(a) is withdrawn, or the justice of the peace by whom any food falls to be dealt with under this Article refuses to condemn it, the district council or, as the case may be, the Department of Agriculture shall compensate the owner of the food for any depreciation in its value resulting from the action taken by the authorised officer.
- (8) Any disputed question as to the right to or the amount of any compensation payable under paragraph (7) shall be determined by a single arbitrator appointed, failing agreement between the parties, by the Head of the Department concerned; and the provisions of the Arbitration Act (Northern Ireland) 1937^[10] shall apply accordingly.
- (9) In this Article—
- (a) any reference to an authorised officer includes a reference to a director of public health of a Health and Social Services Board;
 - (b) in paragraph (7) the reference to the district council or, as the case may be, the Department of Agriculture includes, in relation to a director of public health of a Health and Social Services Board, the Health and Social Services Board;
 - (c) "Health and Social Services Board" means a Health and Social Services Board established under Article 16 of the Health and Personal Social Services (Northern Ireland) Order 1972^[11] .