

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2011

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

Decision (including any steps ordered)

1. The complainant has requested the food hygiene inspection reports for a named company which ran a meat plant. The Food Standards Agency (the "FSA") initially disclosed some information. Additionally, during the course of the Commissioner's investigation it stated that it was now prepared to disclose some additional information. The outstanding information was withheld under the investigations and proceedings exemption (FOIA section 30(1)(a)(i) and (b)); the law enforcement exemption (FOIA section 31(1)(b) and (c)); the commercial interests exemption (FOIA section 43(2)); and the exception for environmental information the disclosure of which would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law (EIR regulation 12(5)(e)).
2. The Commissioner's decision is that FSA has correctly relied upon the investigations and proceedings exemption to withhold some of the non-environmental information. He has also decided that the remaining non-environmental information was correctly withheld under the commercial interests exemption. Finally, he has also decided that the FSA correctly relied upon the exception for information the disclosure of which would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law.
3. The Commissioner requires the FSA to take the following steps to ensure compliance with the legislation.

- It should disclose the information it has identified for disclosure – as set out the emails dated 8 and 13 September 2011 between the Commissioner and the FSA.
4. The FSA must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 12 November 2010 the complainant wrote to the FSA and requested the following information:

"The food hygiene reports for the last three years relating to [the named company]. Please include details of any improvement notices issued."

6. The FSA responded on 13 December 2010 and disclosed some of the requested information. In particular, it informed the complainant that no hygiene improvement notices had been served in the previous three years. However, it stated that some of the requested information was exempt under the following:
- a. the investigations and proceedings exemption;
 - b. the health and safety exemption;
 - c. the personal data of third parties exemption; and
 - d. the exception for information the disclosure of which would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law.
7. The complainant asked for an internal review on 13 December 2010. Following an internal review the FSA wrote to the complainant on 8 February 2011, and upheld its previous use of the FOIA exemptions and the EIR exception.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way her request for information had been handled.

9. On 28 March 2011 the FSA provided the Commissioner with a copy of the withheld information. Following this, on 14 June 2011 the Commissioner wrote to the complainant and stated that unless he heard from her by 17 June 2011, he did not intend to consider the FSA's use of the personal data of third parties exemption. The complainant did not respond, and therefore the Commissioner has not gone on to consider the use of this exemption.
10. Further to this, during the investigation the FSA stated that it now intended to disclose some of the previously withheld information. This information was detailed in an email exchange between the Commissioner and the FSA on 8 and 13 September 2011. This included all of the information that had previously been withheld under the health and safety exemption. Therefore the Commissioner has not gone on to consider the application of this exemption.
11. On 13 September 2011 the Commissioner wrote to the FSA and asked it for some additional arguments in relation to its use of the investigations and proceedings exemption. This was provided to the Commissioner in a letter dated 6 October 2011. In this letter the FSA stated that it also intended to rely upon the law enforcement exemption and the commercial interests exemption.
12. Therefore the scope of this case will be to consider the FSA's use of the investigations and proceedings exemption, the law enforcement exemption, and the commercial interests exemption to withhold the non-environmental information; and the exception for information the disclosure of which would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law, to withhold the environmental information.

Reasons for decision

The investigations and proceedings exemption

13. In this case the FSA has relied upon sections 30(1)(a)(i) and 30(1)(b) to withhold the outstanding non-environmental information. These state that information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of:
 - (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or

[...]

- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct.
14. Section 30 is a class based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage it. If the information in question falls within the class of information set out in the exemption, the exemption is engaged.
15. The Commissioner has first considered the application of section 30(1)(b).

Section 30(1)(b)

16. In order for this exemption to be engaged the authority must have the power to conduct both the investigation and criminal proceedings. However, it is not necessary for the focus of the initial investigation to be on potential criminal proceedings. For example, during the course of an investigation being carried out by a public authority in accordance with its regulatory functions, the authority may decide to institute criminal proceedings. However, the information in question has to be held for the purposes of the investigation.
17. The Food Hygiene (England) Regulations 2006, the Food Hygiene (Wales) Regulations 2006 and the Food Hygiene (Scotland) Regulations 2006, set out a regulatory framework which food businesses have to comply with. In each of these pieces of legislation, regulation 17 makes the breach of certain EC and national legislation an offence. The FSA has confirmed that it is both the regulator and prosecuting authority for food hygiene offences carried out in meat plants. It has also explained that any potential action against the company named in the request would have been carried out under the Food Hygiene (Wales) Regulations 2006.
18. Therefore the Commissioner is satisfied that the FSA is the regulating authority and potential prosecuting authority in relation to the offences set out in this legislation. Bearing this in mind, the Commissioner is satisfied that the FSA has the power to conduct both an investigation and criminal proceedings in relation to the food hygiene regulations.
19. The FSA has explained that in order to assess whether a Food Business Operator (such as the named company in this case) is complying with the food regulations it uses audits. These are, *"...cyclical inspections or an official control required by statute, which are conducted at approved meat establishments by FSA veterinary staff..."*

20. These audits assess the Operator's level of compliance with the regulations and identify necessary enforcement actions. The FSA has stated,

"Issues of non-compliance, the failure to remedy them and how to ensure compliance are dealt with within the FSA's hierarchy of enforcement. FSA veterinary staff are allowed to use various types of enforcement action, ranging from informal action (e.g. verbal advice or an advisory letter) to formal action (e.g. a formal statutory notice, or referral to investigation). The material uncovered during an investigation will have at its base any existing audit reports. At the end of the investigation process the file is forwarded to FSA Legal for review with a view to determining whether a prosecution can be made out or will be undertaken. While not all of the enforcement action undertaken within the audit process will lead to immediate prosecution the information may form part of a subsequent prosecution."

Bearing this in mind, the Commissioner is satisfied that the withheld information was held for the purposes of the FSA's investigation. Therefore, the Commissioner considers that section 30(1)(b) is engaged in relation to this information.

21. This exemption is subject to a public interest test. Therefore the information should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.
22. In respect of the public interest in disclosure the complainant has argued that:
- It is vital for the public to have confidence in the food production process. Openness and transparency on the part of the FSA in publishing the findings of its hygiene inspection reports is a vital part of maintaining public trust in the food chain.
 - The public inquiry into the South Wales E. coli O157 outbreak (which occurred in 2005) highlighted lax food hygiene inspections and deficiencies in inspections carried out by both local authorities and the FSA.
 - There is a public interest in individuals knowing where their food is produced and supplied by reputable firms who adhere to the letter and the spirit of food hygiene inspection.
23. In addition to this, the FSA has recognised that there is a public interest in accountability, transparency in decision making, in the production of safe meat and in animal welfare. In addition to this, the FSA has also recognised that it is in the public interest to publicise hygiene standards

within a food business as this can act as an incentive for Food Business Operators to achieve improved hygiene inspection reports and lead to higher levels of compliance and improved public safety.

24. In favour of maintaining the exemption, the Commissioner notes that when considering the public interest consideration should be given to protecting what is inherent in the exemption – the effective investigation and prosecution of crime.
25. The FSA has argued that it is in the public interest to safeguard its investigatory process, and to preserve the integrity and effectiveness of the investigations and possible court proceedings that it carries out as part of its statutory law enforcement obligations.
26. It has gone on to add that,

*“...it would not be in the public interest for the FSA to release information it may later need to use as evidence in enforcement action in the **continuous compliance monitoring regime that applies to the operation of meat plants** [FSA's emphasis]. Disclosure of [the withheld information in question] would be likely to prejudice the future prosecution of offenders, in that it would open an avenue for defendants to challenge prosecutions, by enabling them to argue that they could not receive a fair trial because of pre-trial publicity, as information about specific breaches that the FSA would be referring to in evidence in a future prosecution would...potentially be releasable by the FSA.”*

27. In reaching a decision as to the balance of public interest arguments the Commissioner has been mindful of the particular circumstances of this case.
28. The Commissioner considers that the public interest arguments in favour of disclosure are particularly weighty in this case. The withheld information relates to FSA inspections of a meat plant owned by the named company. In particular, the withheld information relates to issues of non-compliance recorded by the FSA's inspectors. Given the importance of food producers following correct hygiene procedures, the Commissioner considers that there is a strong public interest in increasing the transparency of the work carried out by the FSA, and in informing the public of any concerns recorded by its inspectors following the inspection of a meat plant producing meat for human consumption.
29. As referred to by the complainant, in 2005 there was an outbreak of E. coli 0157 in South Wales. The report of the public inquiry into this outbreak (which was published in 2009) was critical of food hygiene inspection procedures, and the role and activities of the Meat Hygiene

Service (whose duties have since been taken over by the FSA).¹ The Commissioner considers that this increases the public interest in increasing the transparency of the work carried out by the FSA. In particular, given the findings of the E. coli inquiry he considers that the efficacy of food hygiene inspections has been a matter of considerable public debate. He considers that the disclosure of the withheld information in question would help inform this debate.

30. However, this has to be balanced against the public interest in favour of maintaining the exemption. In particular, the public interest in disclosure has to be balanced against the public interest in avoiding prejudice to the functions set out in section 30(1)(b), i.e. the ability to carry out an effective investigation which may lead to a decision to institute criminal proceedings which the FSA has the power to conduct. In order to reach a view on the weight to give to this public interest argument the Commissioner has taken into account the following factors:
- a. the stage or stages reached in any particular investigation or criminal proceedings at the time of the request;
 - b. whether and to what extent the information has already been put into the public domain;
 - c. the significance or sensitivity of the information; and
 - d. the age of the information.
31. In relation to the first of these factors the Commissioner notes that in the application of section 30(1)(b) it is not necessary for the focus of the initial investigation to be on potential criminal proceedings. In this instance the withheld information relates to the FSA's cyclical inspections (referred to at paragraph 19 above) of Food Business Operators of this type, whose findings could result in criminal proceedings being instituted. The Commissioner notes that the withheld information is contained on audit reports linked to inspections carried out between 2008 and 2010.
32. The FSA has argued that there was a potential for criminal proceedings at the time of the request. It has explained that the offences set out in the Food Hygiene (Wales) Regulations 2006 have a statutory term of limitation (after which charges cannot be brought) of three years from the commission of the offence, or one year from its discovery by the

¹ <http://wales.gov.uk/ecoliinquiry/?lang=en>

prosecutor. As such it would be "prudent" for it to retain the information in the audits which can tend to establish a prosecution for at least three years. It has gone on to explain that,

"Notwithstanding the expiry of a limitation period the details of the breaches in audit reports can also be relevant to enabling the FSA to establish and evidence propensity for non-compliance in the [Food Business Operator], how the FSA as regulator has applied the hierarchy of enforcement measures, to inform the appropriate enforcement measure to take next and other relevant background information for the prosecution case reviewer in coming to a decision about whether to prosecute.

Proceedings may not go forward in all cases, but the nature of the development of food law offences is that they are based on patterns over time. Breach and corrective action information i.e. the information the FSA withheld is retained by the FSA...throughout the life of the approval or the premises i.e. indefinitely, and while it has baseline intrinsic value, the value/relevance of the information on past breaches may increase depending on the current state of compliance of the meat plant and the decision whether or not to prosecute."

33. During the course of the investigation the Commissioner asked the FSA to confirm whether the statutory term of limitation of 12 months (from the time of the discovery of the offence by the prosecutor) would mean that once a breach of hygiene regulations had been recorded on an FSA inspection audit report, it would only have 12 months to prosecute the operator for that breach. The FSA confirmed that this was the case. However, it added,

"...prosecutors do not necessarily prosecute every offence that is recorded in an audit report...Rather...meat plants are subject to a continuous compliance requirement and decisions about enforcement action or prosecution are made after considerations of patterns and levels of compliance and non-compliance over a period of time. This period inevitably extends beyond 12 months because of the continuous nature of the compliance requirements. Also, the types of non-compliance can vary from time to time. For example, if [a Food Business Operator] has been warned about a problem at an earlier date, but the problem recurs, the FSA may want to move to a more serious form of enforcement (such as a prosecution) because of the history at the plant and the fact that warnings had already been given. In such cases, the details of non-compliances recorded in earlier audits would be used by the FSA in evidence to show a pattern or series of particular non-compliant conduct,

and/or to inform the decision of whether to prosecute a new or 'current' non-compliance."

34. Bearing these comments in mind, the Commissioner has gone on to consider the third and fourth factors listed above – namely the significance and sensitivity of the withheld information, and the age of the information.
35. In relation to the significance and sensitivity of the withheld information, if the information – whilst relating to an investigation – was of no particular significance to it, this would reduce the likelihood of harm occurring to the investigatory process through its disclosure. Conversely, the greater the significance of the information, the greater the likelihood of harm to the investigatory process, should this information be disclosed.
36. In this instance, the withheld information in question details incidents of non-compliance recorded by FSA inspectors at a particular meat plant over a number of years. The FSA has argued that all this information is sensitive – both the information that was less than 12 months old at time of the request, which would still lie within the statutory term of limitation of 12 months; and that over 12 months old, which could be used as evidence in any future prosecution of the named company.
37. In relation to the information that was recorded on audit reports that were less than 12 months old, given that this relates to matters that were still within the statutory term of limitation at the time of the request (and were therefore still open to a potential prosecution), and directly records matters that were of concern to the FSA's inspectors, the Commissioner is satisfied that this information was of significance and sensitivity.
38. However, in relation to the information on the audit reports that was over 12 months old at the time of the request, the Commissioner notes that this relates to matters that could not be prosecuted at the time of the request. Although this information still clearly relates to the FSA's investigations into the named company, it could not – in itself – result in a prosecution of the company. The Commissioner acknowledges that the information could be used by the FSA as *"evidence to show a pattern or series of particular non-compliant conduct"* in a future prosecution of the company. However, given the statutory term of limitation he does not consider that this information is as of much significance or sensitivity as the information that was less than 12 months old.
39. In relation to the age of the information, the Commissioner considers that the same factors apply as discussed in the previous two paragraphs.

40. Finally, in relation to the second factor listed above, the Commissioner has found no evidence that any of the information in question has been put into the public domain.
41. Taking these factors into account, the Commissioner considers that there are strong public interest factors in favour of both disclosure and withholding the information. In relation to the information in question that was less than 12 months old at the time of the request, given the significance of the information in relation to any potential prosecution of the named company, the Commissioner finds that the public interest in maintaining the exemption is particularly weighty. Therefore, he has decided that this information is exempt from disclosure under section 30(1)(b). As such, this information should be withheld.
42. However in relation to the information on the audit reports that was over 12 months old at the time of the request, given his findings that this information was not of as much sensitivity or significance to the FSA's investigations, and given the strong public interest factors in favour of disclosure, the Commissioner considers that the public interest factors are finely balanced. In cases where he finds that the public interest factors for and against disclosure are evenly balanced, the Commissioner considers that given the inherent public interest in disclosure the information in question should be disclosed. Therefore, the Commissioner has decided that the information on the audit reports that was over 12 months old at the time of the request is not exempt under section 30(1)(b).
43. The Commissioner has gone on to consider whether this information is exempt under section 30(1)(a)(i).

Section 30(1)(a)(i)

44. For this exemption to be engaged, the information in question has to be held by the authority for the purposes of an investigation which it has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence.
45. In this instance (and as discussed above) the information in question was obtained by the FSA during its cyclical inspections of the company in question. This was a general investigation, from which a decision could be made to institute criminal proceedings against the company. However, after considering the FSA's arguments in this case the Commissioner does not consider that the investigation was commenced with a view to ascertaining whether a person should be charged with an offence. Rather, the evidence supplied to the Commissioner suggests that this was a more general monitoring process, from which matters could arise that might result in criminal charges.

46. Bearing this in mind, the Commissioner is not satisfied that the information in question was held by the authority for the purposes of an investigation which it has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence. Therefore section 30(1)(a)(i) is not engaged in relation to this outstanding information.
47. In relation to the outstanding non-environmental information, which is not exempt under section 30(1)(b), the FSA has also relied upon the law enforcement exemption, and the commercial interests exemption. The Commissioner has gone on to consider the application of the law enforcement exemption to this information.

The law enforcement exemption

48. The FSA has argued that this information is exempt under sections 31(1)(b) and 31(1)(c). These state that information held by a public authority is exempt information if its disclosure would or would be likely to prejudice:
- a. the apprehension or prosecution of offenders, or
 - b. the administration of justice.
49. However, section 31 can only apply to information that is not exempt by virtue of section 30.
50. In this instance, as noted at paragraph 20 above, the Commissioner considers that section 30(1)(b) is engaged in relation to all of the non-environmental withheld information – although he has found that the public interest in maintaining this exemption did not outweigh the public interest in disclosure in relation to some of the information.
51. Where a public authority has applied section 30 and section 31 in the alternative, and the Commissioner finds that section 30 does apply (as in this case), he considers that he must find, as a necessary consequence of this, that section 31 does not. This will remain the case even where the Commissioner find that the public interest in relation to section 30 weighs in favour of disclosure.
52. This is because in the Commissioner's view information is exempt if an exemption is engaged. The effect of the public interest test is to determine whether or not information should be disclosed, even though

it is exempt. It is not the case that where the public interest favours disclosure the information ceases to be exempt.²

53. Therefore, the Commissioner does not consider that sections 31(1)(b) and 31(1)(c) apply to the outstanding non-environmental information.
54. The Commissioner has gone on to consider the application of the commercial interests exemption.

The commercial interests exemption

55. The FSA has argued that this information is also exempt under section 43(2). This states that information held by a public authority is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
56. In this instance the information in question relates to the inspections of a meat plant owned and run by the named company and, specifically, issues of non-compliance recorded by FSA inspectors.
57. The FSA has argued that the disclosure of this information would be likely to prejudice the commercial interests of the named company.
58. In reaching a view on the application of this exemption the Commissioner has first considered whether the potential prejudice argued by the FSA relates to the interest identified in this exemption – i.e. if the prejudice were to occur, would this prejudice relate to the commercial interests of the named company?
59. The FSA has pointed out that this information reflects issues of non-compliance recorded by its inspectors at the premises of the named company. Given the nature of this industry, the FSA has argued that were this information to be disclosed this would be likely to cause reputational damage to the company concerned, and a loss of confidence in its customers. If this were to occur this would potentially lead to a loss of business, and would be likely to be used by its competitors to gain a commercial advantage. Bearing these arguments in mind, the Commissioner is satisfied that the potential prejudicial effects do relate to the named company's commercial interests.
60. In addition to this, bearing in mind the above arguments, the Commissioner is satisfied that there is a causal relationship between the potential disclosure of the withheld information and prejudice to the

² <http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyInter-relationofs35s36andofs30s31.htm>

commercial interests of the named company. Furthermore, he is satisfied that the resultant prejudice (if it were to occur) would be real and of substance.

61. Next the Commissioner has gone on to consider whether the disclosure of this information would be likely to prejudice the commercial interests of the named company.
62. In reaching a decision on the question of the likelihood of prejudice the Commissioner considers that the expression 'likely to prejudice' means that the chance of prejudice being suffered should be more than a hypothetical possibility – there must be a real and significant risk.³
63. The FSA has pointed out that the meat industry is highly competitive, and that the named company shares a market in the region with a number of other meat plants.
64. It has acknowledged that the withheld information recorded issues that represented 'relatively minor non-compliances', but that this information could be misunderstood or misrepresented, especially by the competitors of the named company. This could damage the named company's reputation. The FSA has also argued that this damage would be unjustified, as no formal enforcement action was taken against the company during this time, and nor were any hygiene improvement notices served during this period.
65. Given public concerns surrounding hygiene in meat production, and (in particular) any potential contamination of food sources, the Commissioner considers that it is reasonable to assume that the disclosure of any issues of non-compliance recorded by FSA inspectors at a particular meat plant could potentially damage customer confidence – whether these issues were of major concern or were relatively minor. He considers that this is especially the case in South Wales (where the meat plant in question is located), following the outbreak of E. coli 0157 in that region in 2005. In addition, he is satisfied that this is a competitive industry, and as such it is likely that the named company's competitors could use this information to gain a commercial advantage.
66. Bearing these points in mind, the Commissioner is satisfied that were the withheld information in question to be disclosed, this would be highly likely to result in damage to customer confidence in the named company, potentially leading to loss of business. He is also persuaded

³ John Connor Press Associates Limited v ICO [EA/2005/0005], para 15.

that the named company's competitors could use this information to gain a commercial advantage. Therefore, taking these factors into account, the Commissioner is satisfied that the disclosure of the withheld information would be likely to prejudice the named company's commercial interests. Therefore the exemption is engaged.

67. However, the commercial interest exemption is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.
68. In respect of the public interest in disclosure the Commissioner has considered the arguments he has already set out in relation to the application of section 30(1)(b) – see paragraphs 22-23 and 28-29 above.
69. As regards the public interest in maintaining the exemption the Commissioner has been mindful of his conclusions that disclosure of the withheld information would be likely to prejudice the commercial interests of the named company. He considers that there is a strong public interest in avoiding unwarranted prejudice to the commercial interests of private companies.
70. In balancing the public interest arguments in this case the Commissioner has been particularly mindful that given the level of potential public concern over food safety, this is a sensitive area. In particular, given the outbreak of E. coli 0157 in this region in 2005, any issues of non-compliance recorded by FSA inspectors would be very likely to damage customer confidence in the company in question – even if these concerns were of a relatively minor nature. Therefore, he considers that the argued prejudice is particularly likely to occur. Given this, he finds that the public interest in avoiding this prejudice particularly weighty.
71. The Commissioner is aware that, as noted at paragraph 28 above, he has found that the public interest arguments in favour of disclosure are also particularly weighty in this case. However, he notes the FSA's comments that the issues noted by the FSA inspectors were "relatively minor" and that no formal enforcement action was taken against the named company as a result of these issues.
72. In addition to this he notes that the FSA has disclosed to the complainant that no hygiene improvement notices were issued against the company in question during the period specified in the request. It has also disclosed the audit scores for the period in question – which rates the named company's performance against a number of factors (indeed, the complainant has commented on the audit scores, and has noted that these scores, "*indicate that on the whole, this company is*

compliant with the relevant law and regulation."). Bearing this in mind, the Commissioner considers that the public interest factors in favour of disclosure have been somewhat satisfied.

73. Therefore, after considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Therefore the outstanding non-environmental withheld information is exempt from disclosure under the commercial interests exemption and should not be disclosed.
74. Finally, the Commissioner has gone on to consider the FSA's use of the regulation 12(5)(e), to withhold the outstanding environmental information.

EIR Regulation 12(5)(e)

75. The FSA has relied upon regulation 12(5)(e) in order to withhold a limited amount of information. This provides an exception for information the disclosure of which would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law. This is subject to a public interest test.
76. In this instance the FSA has relied upon this exception showing the amount of waste by-products generated by the meat plant in question.
77. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
 - a. Is the information commercial or industrial in nature?
 - b. Is the information subject to confidentiality provided by law?
 - c. Is the confidentiality required to protect a legitimate economic interest?
 - d. Would the confidentiality be adversely affected by disclosure?
78. If the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the FOIA, it would cease to be confidential.
79. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. In this instance the information in question relates to the amount of waste-products generated by the meat plant in question. The FSA has argued that if this information was disclosed it would be easy for the named

company's competitors to deduce the throughput of the plant, "*i.e. the volume of meat products processed by [the] plant per week...*" Bearing this in mind, the Commissioner accepts that this information is commercial in nature.

80. In order to determine whether the information is subject to confidentiality provided by law the Commissioner considers that this will include confidentiality imposed on any person under the common law of confidence, contractual obligation or statute.
81. The FSA presented an argument that the information was covered by the common law of confidence. When considering whether the common law of confidence applies, the Commissioner will consider the following issues:
 - a. Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
 - b. Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
82. The FSA has explained that this information was provided to one of its inspectors in the course of an audit. It has argued that when this information was provided there was an implicit duty of confidence. In addition to this, it has also argued that it is not trivial, and that it is not in the public domain or available by other means.
83. Bearing these comments in mind, and given the commercial sensitivities of the information as discussed further below, the Commissioner is satisfied that this information is covered by the common law of confidence.
84. In order to determine whether the confidentiality is required to protect a legitimate economic interest the Commissioner considers that, to satisfy this element of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. This will require a consideration of the sensitivity of the information and the nature of any harm that would be caused by disclosure.
85. In this instance the FSA has argued that this information is commercially sensitive to the named company:

"Information relating to throughput (eg weekly waste figure) would provide competitors...with information that would inform how it might best organise its operations/plant (including pricing) to compete with the scale/capacity and type of products of [the named

company's] plant to service a particular geographic area and/or to attract customers away...The meat industry is highly competitive and [the named company] shares a market in South Wales with a number of other meat plants."

86. It has also argued that although this information dates from an audit completed in 2008 (and was therefore two years old at the time of the request) this information was still sensitive at the time of the request. The FSA confirmed that it had contacted the named company about the disclosure of this information, and it had been deeply concerned about its potential disclosure.
87. Bearing these comments in mind, the Commissioner is satisfied that the confidentiality is confidentiality required to protect a legitimate economic interest.
88. As noted above, if the first three elements of the test set out at paragraph 77 can be answered in the positive, the final question will automatically be in the positive. Therefore this exception is engaged.
89. The Commissioner has gone on to consider the public interest test in relation to this exception.
90. In relation to the public interest in disclosure the Commissioner considers that there is a general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process. Additionally, under the EIR there is a specific presumption in favour of disclosure.
91. The Commissioner has already discussed public interest arguments in relation to the disclosure of some of the information contained in the audit reports, and has found them significant and weighty (see paragraphs 22-23 and 28-29). However, bearing in mind the fact that the information in question here only shows the amount of by-products produced by the meat plant, he does not consider that these public interest factors apply to the disclosure of this information.
92. In relation to the public interest in favour of maintaining the exception, the Commissioner notes that regulation 12(5)(e) is designed to recognise that there are certain circumstances in which it is appropriate to withhold information that would harm the commercial interests of a third party or the public authority itself. There is a public interest in ensuring that the commercial confidences are not prejudiced in circumstances where it would not be warranted and proportionate.
93. In balancing the public interest arguments in this case the Commissioner has been particularly mindful of the commercial sensitivity of this

information. Bearing this in mind, he has found the public interest in maintaining the exception particularly weighty.

94. As noted above, although he has found that there are strong public interest factors in favour of disclosing some of the withheld information in this case, the Commissioner does not consider that these factors apply to the information withheld under this exception. Whilst there are public interest factors in favour of disclosure, given the nature of the information being withheld, and in particular its commercial sensitivity, the Commissioner is satisfied that the public interest in maintaining the exception outweighs the public interest in disclosure.
95. Therefore, the outstanding environmental information should be withheld under this exception.

Right of appeal

96. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

97. 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.
98. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

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