

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 May 2013

Public Authority: The Rural Payments Agency (an Executive Agency of the Department for Environment, Food and Rural Affairs)

Address: Area 1B
Ergon House
Horseferry Road
London
SW1P 2AL

Decision (including any steps ordered)

1. The complainant has requested information on inspection visits and enforcement of Community Marketing Rules for Fresh Fruit and Vegetables at St. James' Wholesale Market in Bradford. The Rural Payments Agency ("RPA") refused the request initially under the Environmental Information Regulations 2004 ("EIR") but following an internal review considered the information was in fact not environmental but was exempt under section 43(2) of the FOIA.
2. The Commissioner's decision is that the section 43(2) exemption is not engaged and the RPA is therefore required to disclose the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
4. The public authority 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 August 2012 the complainant wrote to the RPA and requested information in the following terms:

"We would like to request copies of any documents (including e-mails or internal memos and notes) held by the RPA relating to the Horticultural Marking Inspection's enforcement of Community Marketing Rules for Fresh Fruit and Vegetables.

The information we seek is as follows:

- 1. the dates of any inspection visits over the last three years to traders at the St James's Wholesale Market, Essex Street, Bradford, BD4 7PN;*
 - 2. confirmation of whether or not any non-conformances (whether relating to labelling or grading) were identified at any of these visits; and*
 - 3. the details of any action taken by the RPA as a result, including but not limited to prosecution."*
6. The complainant provided an appendix listing the traders at St James' Market it was requesting the above information on. The RPA responded on 11 September 2012. It stated that the information had been considered under the EIR and was exempt on the basis of regulation 12(5)(b) – adverse effect on the course of justice – and regulation 12(5)(e) – commercial confidentiality.
7. Following an internal review the RPA wrote to the complainant on 9 November 2012. It stated that having reviewed the handling and response to the original request it now considered the information was not environmental as it related to inspection visits and non-compliance with grading and labelling. Having determined the information was not environmental the RPA looked at the request under the FOIA and, for much the same reasons as it had previously considered regulation 12(5)(e) applied, the RPA refused to provide the requested information under the FOIA on the basis of section 43(2) – prejudice to commercial interests.

Scope of the case

8. The complainant contacted the Commissioner on 3 December 2012 to complain about the way their request for information had been handled. In particular the complainant was not satisfied that the RPA had

demonstrated how the disclosure of the information would, or would be likely to, prejudice the commercial interests of any party.

9. The Commissioner therefore considers the scope of his investigation to be to determine if the commercial interests exemption is engaged and, if so, whether the public interest in disclosure of the requested information outweighs the public interest in maintaining the exemption.

Reasons for decision

10. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

11. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance¹ on the application of section 43 which states that:

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

12. The Commissioner has looked at the withheld information and he notes that it consists of a list of the traders at the market with the dates of visits, details of the number of enforcement notices issued and the percentage of conformity action taken. The Commissioner accepts that the information relates to a commercial activity in that the information relates to inspections by the Horticultural Marketing Inspectorate on market traders to check their produce complied with Community Marketing Rules for Fresh Fruit and Vegetables.
13. However, the information will only fall within the scope of the exemption if its disclosure would, or would be likely to, prejudice a commercial interest. The Commissioner has therefore gone on to consider the nature of the prejudice which the RPA has argued that disclosure would create.

1

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

14. In order to demonstrate prejudice the Commissioner considers the prejudice should be seen to be real, actual or of substance and the public authority should be able to show a causal link between the potential disclosure and the prejudice.
15. The RPA considers that disclosure would be likely to prejudice the commercial interests of the traders and has stated that disclosure of the requested information would give traders access to information about enforcement action taken against their close competitors. This information would then provide an unfair advantage to some traders as they would be able to inform their customers of the levels of enforcement action taken against their competitors.
16. The RPA has then gone on to explain that even just disclosing the dates of visits and inspections could prejudice certain traders commercial interests as the frequency of visits is often attributable to compliance i.e. the higher the number of visits the more likely there has been some non-compliance.
17. RPA has confirmed it did not contact traders to establish if they had any objections to disclosure but relied on the Horticultural Marketing Inspector's (HMI) knowledge of the commercial sensitivity of the trader's business sector. The RPA is also of the view that disclosure could damage its ability to carry out routine inspections in a neutral manner but has not expanded on this point. In any event, the Commissioner does not consider this argument to be relevant to the application of the section 43 exemption as there is no suggestion disclosure of the withheld information would be likely to be prejudicial to the commercial interests of the RPA.
18. The Commissioner has set out his position that the prejudice test is not a weak test and that any ascribed prejudice must be "real, actual or of substance" and authorities must be able to show some causal link between the potential disclosure and the prejudice.
19. In this instance, the Commissioner considers that the RPA has failed to properly explain the nature of the prejudice which disclosure of the requested information would cause and has not provided arguments which meet the evidential burden provided by the limb of the exemption it is relying upon.
20. The Commissioner considers that the arguments provided by the RPA do not demonstrate the causal link between the specific withheld information and the alleged effects of disclosure. The Commissioner is not satisfied that disclosure would have the prejudicial effect set out by the RPA as there is no evidence to suggest that traders would use information about visits to other traders to influence customer behaviour

with the consequence of impacting on the levels of custom. Whilst the Commissioner accepts that there is a possibility of this he considers the argument to be speculative and not specific enough to demonstrate a real and actual level of potential prejudice.

21. The Commissioner has therefore concluded that the RPA has failed to explain the nature of the implied prejudice and the causal link between any such prejudice and the disclosure of the information. As such he has concluded that the RPA has failed to demonstrate that the exemption is engaged and he has not gone on to consider the public interest test.

Right of appeal

22. 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

23. 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.
24. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
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SK9 5AF