

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 November 2013

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

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to results of tests done to identify types of meat and fish used in food products.
2. The Food Standards Agency (FSA) refused to disclose the requested information under section 31(1)(g) with subsection 2(a) and (c), section 38(1)(a) and (b) and section 43(2).
3. The Commissioner's decision is that the FSA has correctly applied section 31(1)(g) with subsection 2(a) and (c) to the withheld information.
4. The Commissioner does not require any steps to be taken as a result of this decision notice.

#### Request and response

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5. On 15 February 2013, the complainant wrote to the FSA and requested information in the following terms:
  1. *In 2012 are you aware how many tests were conducted in England for meat identification? How many of these tests came back with unsatisfactory results? Please give details in relation to each of the results that was deemed unsatisfactory; and*
  2. *In 2012 how many times are you aware that DNA tests on food products to determine fish species were carried out where the species discovered was not as expected? For each case give*

*details of the product/brand/manufacturer of the product, the species it was supposed to be and the quantity and species of the detected fish or other foodstuff.*

6. The FSA responded on 15 April 2013 and provided all the information requested in part 1 of the request. In responding to part 2 of the request the FSA carried out a search of the UK Food Surveillance System (UKFSS) and found information relating to samples of fish tested for authenticity during 2012 that was within the scope of the request. The information was provided, with the exception of a brand name of a fish product in relation to part 2 of the request. It cited section 43(2) as its basis for withholding that part of the information.
7. Following an internal review the FSA wrote to the complainant on 11 June 2013. It maintained its position that the withheld information was exempt by virtue of section 43(2). In addition, the FSA considered section 31 also applied.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 6 July 2013 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the FSA has correctly applied the exemptions at sections 31 and 43(2) of the FOIA to the withheld information.

### **Reasons for decision**

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10. The FSA has stated that it is relying on sections 31(1)(g) and 31(1)(c) of the FOIA.
11. Section 31(1)(g) states that, information is exempt if it would or would be likely to prejudice any public authority in the exercise of its functions for any of the purposes specified in subsection (2).
12. The purposes specified at subsection (2)(a) and (c) are, the purpose of ascertaining whether any person has failed to comply with the law and the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or arise.
13. The FSA stated that the public authority concerned is a city council, which is the district council that provided the data to the FSA, and within whose area the food producer is based. The name of the council, which

could be used to identify and locate the company name, has not been disclosed to the complainant.

14. The FSA further stated that the functions likely to be prejudiced would be the local authority's ability to ascertain whether any person has failed to comply with the law (in this case whether deliberate steps were taken by a food business to mislabel and misrepresent food products) (section 31(2)(a)) and whether regulatory action now or in future may be justified in the circumstances (given that a food product mislabelled, albeit in error, was on sale) (section 31(2)(c)).
15. The FSA explained that under food safety legislation it is an offence to sell food "not of the nature or substance or quality demanded" or to falsely describe or present food. Authorised officers of the local authority have the power under the legislation to procure food samples, submit them for analysis and to take enforcement action where necessary.
16. The Commissioner is satisfied that the local authority does have a relevant function for the purposes specified at subsection (2)(a) and (c). Therefore he must first determine whether the prejudice claimed is likely to occur and, if he is satisfied that it is, he must then consider the public interest in this case.
17. The FSA explained that the legislation sets out the time limits for prosecutions, which is three years from the commission of the offence or one year from its discovery by the prosecutor. At the time of the request, the non-compliance recorded on the UKFSS was less than 12 months old and therefore was still within the statutory term of limitation (and therefore was still open to a potential prosecution).
18. As the responsible enforcement body, it was for the local authority to lead an investigation into the mislabelling and determine what action, if any, should be taken. The FSA considered that section 31 was engaged (and remains engaged) as disclosure of the information by the FSA would enable the public to form opinions on the company and its products, and would be likely to prejudice the local authority's ability to determine the course of its investigation and any enforcement action that might be justified at the time of the request, now and in the intervening months.
19. During consideration of the original request, the FSA consulted the local authority about any enforcement action that it had taken or planned to take. The local authority informed the FSA that, following an investigation, it had decided that deliberate substitution of fish products was unlikely to have occurred as invoices had shown that, at the time the sample was taken, the price of the whiting was more expensive than cod and therefore the company would not have made a financial gain

from any deliberate substitution. The local authority noted that the company had also taken action to prevent the potential mislabelling from occurring in future. The local authority decided that the most appropriate course of action was to issue the premises with a warning letter.

20. The local authority also informed the FSA that it would be monitoring the premises by taking further fish samples, and in fact did so in February 2013 when no authenticity issues were identified. While there is a statutory limitation on a specific offence, decisions on enforcement are taken by a local authority following the monitoring of a food business's compliance over a period of time. The fact a warning letter was issued, and its content, could be referred to by the local authority in the future in the event of any recurrence of mislabelling or any similar authenticity issues and would inform the local authority's decision about future enforcement action. Therefore, disclosure of this information by the FSA would be likely to prejudice any future enforcement action by the local authority.
21. As the local authority has in this case decided and presented evidence that a warning letter is the appropriate enforcement measure in its hierarchy of enforcement, it would be unfair for the FSA to place the information in the public domain and undermine the regulatory role of the local authority in ascertaining whether or not the company has been compliant with the law. Information from the local authority was provided to the Commissioner.
22. In addition, the FSA considers that the exemption in section 31(1)(c) of the FOIA ('information the disclosure of which would be likely prejudice to the administration of justice') would also be engaged if the FSA was to disclose the company's name, should the local authority decide, in the event of further evidence gathered from monitoring the company's compliance with food law requirements regarding labelling and authenticity, to pursue a prosecution for future similar non-compliances. This is because disclosure would put adverse information in to the public domain about the company's compliance record, which would be likely to affect its right to a fair trial. This is recognised in both ICO<sup>1</sup> and MoJ<sup>2</sup> guidance on section 31.

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/law-enforcement-foi-section-31.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx), paragraph 25

23. The Commissioner considers that at the time of the request and currently, the local authority is still in the process of monitoring the food producer and that this is likely to be carried out over a number of months.
24. If the FSA were to disclose information relating to the name of the company concerned, this would be likely to prejudice the local authority's on-going monitoring. This is because this would publicly make information available which may pre-empt the local authority's conclusions. The Commissioner considers that this would be likely to hinder the co-operation of the company involved which may jeopardise the on-going monitoring and ultimate outcomes.
25. The Commissioner is aware the FSA has argued that the prejudice would be likely to occur in this case. As the local authority's monitoring was on-going at the time of the request, and likely to continue, the Commissioner considers that this increases the likelihood of the prejudice occurring.
26. The Commissioner considers that in this case section 31(1)(g) with subsection (2)(a) and (c) is engaged and will therefore go on to consider the public interest arguments in this case.

### **Public interest arguments in favour of disclosure**

27. In favour of disclosure the FSA considered the general public interest as set out in ICO guidance<sup>3</sup>, of maintaining confidence in law enforcement through greater transparency in the enforcement process and how these functions are performed. Without such information the public may lack confidence and trust in the bodies involved. It also considered the strong public interest in food authenticity. In light of the horse meat incident, public concern about what goes into food and whether food is correctly labelled has been heightened. The FSA is also aware of particular public concern about mislabelling of fish species and one of the sampling priorities for the National Co-ordinated Food Sampling Programme for 2013-14, to which the FSA contributes funding, includes sampling of fish labelled as cod or haddock in catering establishments.

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<sup>2</sup> 6 <http://www.justice.gov.uk/downloads/guidance/freedom-and-rights/foi-exemption-s31.pdf>, pages 4 & 7

<sup>3</sup> Law Enforcement (section 31) page 29,  
[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~/media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/law-enforcement-foi-section-31.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx)

28. The Commissioner also considers that there is a strong public interest in disclosure to inform public debate and awareness of food authenticity.

**Public interest arguments in favour of maintaining the exemption**

29. The FSA has argued that in favour of withholding the information is the strong public interest in ensuring that the local authority's ability to take future enforcement action to secure compliance with food law is not prejudiced by inappropriate and premature disclosure of information. This includes the public interest in not facilitating adverse pre-trial publicity by the release under the FOIA of details of non-compliance that would be likely to prejudice the administration of justice, such as the defendant's ability to receive a fair trial, should circumstances arise in which the local authority decided to pursue legal proceedings against the company for possible future non-compliances regarding labelling and authenticity.
30. The UKFSS provides real-time sampling data to the FSA and local authorities and its purpose is to provide the FSA with intelligence about levels of business compliance with food regulations, monitor local authorities' food sampling activities, and identify any emerging food risks or trends and gaps in sampling. It also allows the FSA to co-ordinate reporting of sampling information and for national, anonymised information to be shared among local authorities. UKFSS users (within local and Port Health Authorities) receive training that highlights the risks of prejudicing enforcement action or prosecutions or causing commercial damage to food business operators through accidental or mistaken release into the public domain of a brand or premises name, and users are warned during training to ensure data is stored securely and only made available to local authority officers with a relevant business need.
31. The FSA is reliant on retaining the confidence of local authorities that information supplied to the FSA will be used appropriately and proportionately and that the regulatory and enforcement role of the local authority will not be undermined by inappropriate disclosure.
32. Those local authorities and Port Health Authorities that participate in the UKFSS (62% of local authorities across the UK as a whole) input directly into the database the results of tests conducted on food samples collected by the authority within its area.
33. The individual datasets are owned by the contributing authority and the collated data that is hosted on UKFSS is owned by the FSA. Local authorities understand that we may disclose information contained in the database except where an exemption under the FOI Act applies. The

FSA would always consult with the relevant local authority to inform its decision whether information they provided can be released or is exempt from disclosure.

34. It is not in the public interest to disclose information held on the UKFSS database that would be likely to weaken local authorities' confidence in sharing data with the FSA and undermine the free flow of information to the FSA, thereby preventing it from obtaining the necessary intelligence that sampling data provides and prejudicing its ability to effectively regulate the food industry.
35. Another public interest which needs to be protected is that local authorities need to establish and maintain good working relationships with the food businesses they regulate. As required by the Regulators' Code, regulation should be proportionate, and local authorities (like most regulators) follow a hierarchy of enforcement models, ranging from education and advice, to written warnings, and up to formal enforcement notices. For local authorities to secure compliance from food businesses there needs to be a good level of cooperation with food businesses, which is assisted by food businesses' willingness to promptly provide all necessary information to local authorities. Disclosure of information by the FSA that local authorities would normally withhold would be likely to undermine the cooperative relationship between local authorities and food businesses, and make businesses reluctant to supply necessary information to local authorities in future.

### **Balance of the public interest**

36. The Commissioner considers that there is a public interest in increasing confidence in the FSA and local authorities' enforcement powers in relation to the issues surrounding this case. He also considers that there is a public interest in disclosure of information which can inform public debate.
37. The Commissioner does however consider that there is a strong public interest in safeguarding the investigatory process and not disclosing the names of businesses prior to making a decision about whether to prosecute. This is because there is a strong public interest in preserving the effectiveness of an on-going investigation as well as ensuring that those involved provide full co-operation to relevant enforcement authorities.
38. In this case the Commissioner considers that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.

39. As the Commissioner has decided that the FSA has correctly withheld the information under section 31(1)(g) he has not gone on to consider the application of section 43.



## Right of appeal

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40. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

41. 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.
42. 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**  
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**Wilmslow**  
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