

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2019

Public Authority: Warwickshire County Council

Address: Shire Hall
Warwick
Warwickshire
CV34 4RR

Decision (including any steps ordered)

1. The complainant has asked Warwickshire County Council all emails, reports, photos and letters which relate to a visit by Warwickshire Trading Standards and the Animal and Plant Health Agency ("APHA") to a named game bird farm on 27 July 2017. The Council has refused the complainant's request in reliance on section 30(1)(b) of the FOIA.
2. The Commissioner's decision is that Warwickshire County Council has correctly applied section 30(1)(a) of the FOIA to the information requested by the complainant. The Commissioner is satisfied that the information relates to investigations the public authority has the power to conduct and the public interest favours withholding that information.
3. No further action is required in this matter.

Request and response

4. On 8 September 2017, the complainant's wrote to the council and requested information in the following terms:

"In accordance with the Freedom of Information Act 2000, I request disclosure of the following information:

 1. The date and time that Warwickshire Trading Standards visited the farm with APHA [the Animal and Plant Health Agency].

2. Whether or not the owners and/or workers at [name of business redacted] were informed about the visit ahead of the visit taking place.
3. If so, the date and time that the owners and/or workers were informed of the visit.
4. Documents, emails or other communications relating to the outcome of the visit.
5. Details of the Trading Standards visit to [name of business redacted] - which parts of the farm were inspected; which areas of concern raised by [name redacted] were addressed on that visit; whether the visit included an inspection of the live birds (and if so how many cages were inspected); the length of the visit.
6. An explanation as to why no further action will be taken by Trading Standards.
7. Whether Trading Standards will be making a return visit to the farm, and if so, an approximate date of when it will take place.

Please note that I do not seek for any information which identifies individuals or third parties to be disclosed and agree for such to be redacted within reason."

5. The complainant's request resulted in a complaint being made to the Information Commissioner which was investigated under reference FS50723451. A decision notice was served on 30 July 2018.
6. In that decision notice the Commissioner found that the Council was able to rely on section 30(1)(b) of the FOIA in respect of parts 4 and 5 of the complainant's request. Parts 1, 2, 3, 6 and 7 of the request were not considered in the Commissioner's notice on the grounds that the Council had answered those parts.
7. On 6 December 2018, the complainant submitted an on-line request to the Council. The terms of the complainant's request are:

"In light of the APHA's disclosure relating to this case, and in accordance with the Freedom of Information Act 2000, I again request disclosure of all emails, reports, photos and letters relating to the visit by Warwickshire Trading Standards and APHA to the Heart of England game bird farm on 27 July 2017.

Please note that I do not seek for any information which identifies individuals or third parties to be disclosed and agree for such to be redacted."

8. The Council responded to the complainant's request on 18 December 2018. Noting that the complainant's request is "substantially similar" to

the request it had previously considered, the Council confirmed that it holds the information the complainant had asked for but refused to supply it in reliance on sections 30(1)(b), 41 and 40(2) of the FOIA and Regulation 12(5)(b) of the EIR.

9. The Council advised the complainant that the public interest had been considered and was found to favour the continued withholding of the information.
10. The Council told the complainant that it "...has no reason to believe that the situation has changed since September 2017 when we refused your previous request. We therefore consider that this information remains exempt under section 30(1)(b) of the Act, but also under other sections of the Act and under the Regulations".
11. The complainant wrote to the Council on 21 December 2018 with the stated purpose of seeking clarity in respect of the Council's handling of her request. The complainant advised the Council of her opinion that the position has changed in respect of its reliance on sections 30 and 41 and that the Council could no longer rely on these exemptions.
12. The complainant asserted that, "...there can be no prejudice to future investigations and no expectation of confidentiality where there is already information in the public domain". She pointed out that Farm had been named in a Daily Mirror article in 2017 and she attached a copy of a response made to a complaint submitted to the Animal and Plant Health Agency (APHA) concerning Heart of England farms Ltd.
13. On 24 January 2019, the Council responded to the complainant's email. The Council accepted that, "to the extent the Council holds information provided by APHA in confidence at the time of supply, their decision to disclose this information to you is likely to allow the Council to set aside our concerns about breaching the confidence of APHA. I can therefore confirm that we no longer seek to rely on section 41 of the Act". The Council advised the complainant that it did not agree that section 30 cannot be relied on. The Council said, "Upon receipt of your most recent request, we gave consideration to whether the situation had changed since September 2017; we resolved, on the basis of the contextual information we had that it had not".
14. The Council informed the complainant that it had revisited her request, and its public interest considerations, and had determined that the disclosure made by APHA does not change its position in respect of the information it holds. The Council added, "You have not questioned the application of sections 40(2) of the Act or Regulation 12(5)(b) of the Regulations; I will not add any further comment on our application of those exemptions/exceptions".

15. On 15 February 2019, the complainant asked the Council to review its decision to withhold the information she has asked for. The complainant asked the Council to confirm that it is solely relying on section 30(1)(b) of the FOIA and that it no longer relies on section 41 of the Act and 12(5)(b) of the EIR. The complainant argued that the Council had failed to properly apply the public interest in respect of its application of section 30(1)(b) and therefore the Council was invited to disclose all material within parts 4 and 5 of the request.
16. The Council wrote to the complainant on 14 March 2019, providing her with a detailed account of its internal review and final decision. The Council concluded that it was correct to withhold the information requested by the complainant in reliance on section 30(1)(b) of the FOIA and it advised her that the public interest in this exemption being maintained outweighs the public interest in the information being disclosed.

Scope of the case

17. The complainant contacted the Commissioner on 29 March 2019 to complain about the way his request for information had been handled.
18. The complainant advised the Commissioner that she considers the Council has erred in concluding that the public interest in withholding the information outweighs the public interest in disclosure.
19. The complainant maintains that the Commissioner's first decision does far more than simply "allude" to the importance of confidentiality in respect of the public interest test. She argues that, in fact, it formed the crux of the first ICO Decision. The complainant argues that confidentiality no longer exists in light of APHA's disclosure of the equivalent information and this fundamentally alters the balance of the public interest test, including the impact of disclosure on future investigations - whether of the same Farm or different farms.
20. The complainant suggests that the Council's withdrawal of its reliance on section 41 of the FOIA constitutes an acknowledgment that the information is not confidential.
21. The complainant argues that the Council's position that there are differences in the content and presentation of the sets of information can be of no relevance to the question of confidentiality. It believes the content is substantively the same, in which case there is no longer any confidentiality in the information, or it is substantively different. If the information is substantively different the complainant accepts that there may still be confidentiality, but the public interest in disclosure can only

be even higher where two different regulatory organisations have conducted an investigation at the same time, but recorded substantively different information or reached different conclusions.

22. Whether or not the information is substantively different, the complainant understands that such inspections are almost always carried out in conjunction with APHA and, even if there is a real risk of prejudice, that prejudice will exist simply as a result of APHA's presence and its previous disclosure.
23. The complainant notes the Council is arguing that disclosure would prejudice future investigations of the same Farm, when no attempt would appear to have been made to actually discuss this matter with the Farm, who had consented to disclosure of the equivalent information from APHA. The complainant therefore asserts that it would seem unlikely that an organisation that had consented to disclosure of information about an investigation would then use disclosure of such information to refuse cooperation in a future investigation.
24. The complainant says it remains unclear how information about an investigation that had found compliance with statutory standards could be used to damage that Farm's reputation. In respect of investigations of other farms, the extent of prejudice has to be measured against how many investigations the Council actually carry out. The complainant has informed the Commissioner that, between 2014 and 2017, APHA undertook just 26 inspections of "game bird" farms across all of England and Wales.
25. The Council indicated to the complainant that there is only one game bird farm within its area and she understands that such inspections only take place when a credible complaint has been received.
26. While relying on the potential cost and inconvenience of having to use formal powers, the Council has offered no information as to how many such inspections it has actually been involved in and the potential costs of using its formal powers. The complainant therefore suggests that any additional costs are likely to be negligible given that there is only one game bird farm in its area. The complainant does not accept that such prejudice could extend beyond "game bird" farms given the very particular circumstances in which they operate.
27. The complainant accepts that the passage of further time is a relevant consideration and should be taken into account by WCC. However she sees no reason why this consideration should only apply to future investigations of the same farm. Accordingly the complainant considers that, given the change in circumstances since the first ICO Decision, the public interest in withholding is now far lower than stated by the Council. She argues that it is clear that the only conclusion that can be

reached is that the strong public interest in favour of disclosure outweighs any weak public interest against disclosure.

28. Finally, the complainant notes that the Council appears to make specific arguments about communications between WCC and APHA. The complainant does not support the Council's distinction and it is not clear whether the Council has considered whether some of the withheld information could be disclosed, with parts redacted or whole documents omitted.
29. The Commissioner has noted the arguments and assertions advanced by the complainant and she advised the complainant that the focus of her investigation would be to determine whether the Council is entitled to withhold information from her in reliance on section 30(1)(b) of the FOIA.

Reasons for decision

Section 30(1)(b)

30. The Council has confirmed to the Commissioner that it relies on section 30(1)(b) of the FOIA to withhold information from the complainant which meets the terms of the request made on 6 December 2018.
31. Section 30(1)(b) of the FOIA states that:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institutes criminal proceedings which the authority has the power to conduct, ..."
32. The Council has explained why the withheld information relates to an investigation it undertook in conjunction with the Animal and Plant Health Agency (APHA), at APHA's request under section 28 of the Animal Welfare Act 2006. The purpose of the investigation was to assess whether there were any non-compliance issues at a specific game breeding farm.
33. Section 28 of the Animal Welfare Act 2006 states that:

(1) An inspector may carry out an inspection in order to –

(a) check compliance with regulations under section 12 which relate to animals bred or kept for farming purposes;

(b) ascertain whether any offence under or by virtue of this Act has been or is being committed in relation to such animals.

36. The investigation was prompted by a complaint made to APHA by Animal Aid on 25 July 2017 which followed undercover investigations by Animal Aid in June and July.
37. The Council provided the Commissioner with copies of the information it is withholding from the complainant. That information relates to the investigation the Council conducted in conjunction with APHA. It consists of the following information:
 - The original complaint received and logged by the Council;
 - Notes from the joint Trading Standards and APHA visit on 27 July 2017 made by the Trading Standards officer;
 - Records of telephone calls and emails between Trading Standards and APHA following the joint visit prior to a decision being made in terms of whether further action would be taken;
 - Un-redacted copy of APHA's notes of the joint visit on 27 July 2017;
 - Notes from APHA regarding the outcome of the visit which have already been disclosed to the requestor by APHA;
 - Photographs taken by the Trading Standards officer during the joint visit with APHA on 27 July 2017;
 - Emails between APHA and Trading Standards between the date that the complaint was made by Animal Aid to APHA (25 July 2017) and 31st August 2017 – which was before a decision to take no further action was made in September 2017.
38. The email correspondence includes discussions about how the visit to the farm is to take place and also discussions between the two organisations following the visit. The emails include the original complaint sent by Animal Aid to APHA and also some emails from Animal Aid chasing up a response to their complaint.
39. The Council has advised the Commissioner that all of the withheld information was generated once the complaint from Animal Aid had been received: It was produced as a result of the visit and during the time during which consideration was being given as to whether to take any further action.
40. None of the withheld information was produced following the decision to take no further action, and the investigation was complete at the time of the request. Notwithstanding this, the Council assures the Commissioner that the withheld information could be used to inform any future investigations of this particular farm.

41. The Council has advised the Commissioner that its powers to carry out investigations of this type are derived from the legislation mentioned above and that the withheld information was required by the Council for it to check compliance with the Animal Welfare Act 2006 and any regulations made under that Act, to ascertain whether any offence was being committed.
42. The Council has a power under section 30 of the Animal Welfare Act to prosecute for any offence under that Act.
43. Section 30(1)(b) is a class based exemption. This means it applies to all information held in respect of a relevant investigation. Given that the information relates to a specific investigation which the Council was empowered to carry out, the Commissioner is drawn to conclude that the exemption is engaged.
44. Notwithstanding the fact that the exemption is engaged, the Commissioner is obliged to consider whether the public interest favours the disclosure of the withheld information.
45. The Commissioner notes that the requested information in this case is the same information requested by the complainant in case FS50723451.
46. Therefore, the issue in this case is whether the public interest in withholding the information is diminished by the voluntary disclosure of information to the complainant by APHA and the time which has passed since the Commissioner's decision of 30 July 2018.
47. In view of this, the Commissioner has chosen not to rehearse the public interest arguments made in case FS50723451. The Commissioner notes however that there is still no evidence which suggests or indicates that this particular investigation was carried out improperly.
48. The Commissioner agrees with the Council's assertion that the fact that a particular organisation disagrees with the outcome of an investigation, does not of itself mean there is good cause to suspect that the investigatory process had been conducted inappropriately or that there was some failure leading to the decision to take no further action.
49. The Commissioner acknowledges that APHA made a voluntary disclosure of information to the complainant following the complainant's first request. She notes that APHA disclosed redacted notes of the visit made to the farm and also the outcome of that visit.
50. The Commissioner does not agree with the complainant's argument that APHA's disclosure of its notes of the visit and a record of the outcome

weakens the Council's argument that the public interest in withholding the information. She accepts that APHA's voluntary disclosure of information together with the initial allegations made by Animal Aid means that some of the withheld information is in the public domain.

51. The Commissioner is mindful of the decision of the Information Tribunal in *Armstrong v Information Commissioner and HMRC EA/2008/0026*, 14 October 2008, that:

"Even if the information had previously entered the public domain, that is not in itself conclusive of whether the public interest weights in favour of disclosure, it is merely one consideration to be weighed in the public interest balance."

52. The Commissioner considers that, where such disclosure has taken place, care should be taken to consider whether the further disclosure of information, as required in this case, might actually reveal anything new.
53. Here, the Council's position is that the withheld information includes a significant amount of information which is not contained in the information disclosed by APHA. That information includes correspondence between the Council and APHA prior to and following the visit to the farm, and prior to the decision to take no further action.
54. The Commissioner accepts that APHA's disclosure of the information does not detract from the Council's position as to why it should continue to withhold its information.
55. Additionally, the Commissioner is mindful of the Council's concerns that, should the officers notes of the farm visit be disclosed out of context of the other withheld information, they could be compared to the report of the visit disclosed by APHA and used by Animal Aid to try and undermine the decision that there was compliance with the legislation following the investigation.
56. The notes of the Council's investigating officer are brief and written in note form. They record that officer's observations during the visit to the farm. Following that visit the investigating officer had further discussions with APHA, and APHA had discussions with other experts, before concluding there were no offences to prosecute. It is clear to the Commissioner that APHA's disclosure of information to the complainant does not provide a full picture of the investigation, either in terms of how it was undertaken or in respect of the information that was gathered and considered by the Council as part of the investigation.

57. In respect of the public interest favouring the continued withholding the Council's information, the Commissioner finds that there is a significant public interest in allowing the Council and other organisations to conduct its investigations in a thorough and effective manner. To be effective, the Council relies on the goodwill and cooperation of the businesses it is investigating. This requires businesses to be willing to have open discussions with the Council which allows the Council to properly scrutinise their actions.
58. Disclosure of the information requested by the complainant presents a real and significant risk to the extent to which businesses cooperate with investigations of the type carried out by APHA and the Council. This is particularly so in respect of investigations concerning emotive issues such as animal welfare, where the reputation of a business can be easily damaged by negative press even where it has been found to be in compliance of the legislation and standards.
59. The Commissioner recognises the potential and serious impact of this loss of cooperation. She acknowledges that authorities might be required to rely on more formal powers to gather information and thereby to require greater time and add to the cost and length of such investigations. This could result in fewer complaints being investigated properly which would ultimately impact on how effectively the Council undertakes its functions in respect of animal welfare and other enforcement responsibilities.
60. The Commissioner cannot lose sight of the effect on the particular farm in considering this matter. She must acknowledge the public interest in protecting the reputation of businesses where investigations have been carried out which conclude that the business is complying with the necessary legislation and standards.
61. In sensitive and emotive cases such involving animal welfare, there is a risk that disclosure of the details of an investigation could lead to "trial by media" and cause false or damaging accusations to be made against businesses who are complying with the law.
62. The fact that some information relating to this investigation is now in the public domain could be seen to weaken this argument. However, the Commissioner agrees with the Council that the disclosure of information which is not already in the public domain presents a real and unwarranted negative impact to the reputation of that particular farm.
63. Although the investigation of this farm has now been completed, the Commissioner accepts the possibility that information gathered during the investigation could be used in a future investigation of this business. It is certainly possible that new allegations might be made in the future or the business might be found to have failed to take action it had

agreed to take. Clearly the disclosure of the requested information could adversely affect the effectiveness of such future investigations. The risk to future investigations is one of the central purposes behind section 30(1)(b) and there is a very strong public interest in protecting this investigation information from disclosure in order that it can be used in the future if required.

64. The Commissioner considers that, whilst there is a public interest in ensuring business are complying with relevant legislation and standards, it is not in the public interests for those businesses who are cooperating with Council investigations to be subject to potential "trial by media". The Commissioner must acknowledge the existence of statutory powers and duties which require the Council, in conjunction with parties such as APHA, to judge whether businesses have complied with the law. If those authorities' investigations conclude that businesses they have not complied with the law, then the Council has the power to prosecute. Details of such prosecutions are then put in the public domain.
65. The complainant has asserted that the Commissioner's decision in case FS50723451, "... does far more than simply "allude" to the importance of confidentiality in respect of the public interest test and that it in fact, formed the crux of the first ICO Decision". The complainant says, "Such confidentiality no longer exists in light of APHA's disclosure of the equivalent information and this fundamentally alters the balance of the public interest test, including as to the impact of future investigations whether of the same Farm or different farms. We would suggest that the fact that the Council originally relied upon section 41 of FOIA, but withdrew that reliance, constitutes an acknowledgment that the information is not confidential."
66. In response to the complainant's assertion the Commissioner must emphasise that the Council is not relying on the exemption provided by section 41 of the FOIA. For the purpose of clarity, the Council explained that section 41 only previously applied to the information received by the Council from APHA. Since APHA made its voluntary disclosure of that information, the Council's reliance on section 41 fell away and this was withdrawn. The Council is now solely relying on section 30(1)(b) which protects information held by the Council for the purposes of any investigation conducted by the Council and in the circumstances may lead to a decision to institute criminal proceedings.
67. Regardless of APHA's disclosure, the Council still holds information which was created as a result of this investigation and it is therefore exempt from disclosure by virtue of section 30(1)(b). The Council's information is not currently in the public domain and it maintains the position that it is not the public interest for this information to be disclosed.

68. In her previous notice, the Commissioner recognised the strong public interest in protecting intelligence which has been obtained during the course investigations of this type, noting that such intelligence could be used in the future if necessary. The report disclosed to the complainant by APHA was not the only information to be considered by the Council during the investigation.
69. The Commissioner notes that the investigation of this particular game farm occurred two years ago. Whilst she acknowledges that the original allegations were made public at that time, the Commissioner believes that releasing further information at this juncture would be counter to the public interest. There would be a real risk to the business that false or distorted allegations would be made against the farm and this would damage its reputation in circumstances where the farm has been found to be in compliance of the law. This would likely deter that and other businesses from complying with future investigations.
70. The APHA report records APHA's observations conclusions made and resulting from the joint visit with the Council. The information which the Council is withholding includes, but is not limited to, the Trading Standard officer's observations from the joint visit. Whilst the Council's records do not contradict the APHA observations, they are not the same and are part of the information considered by the Council. The Council disagrees that the disclosure by APHA means that the public interest in disclosing the remainder of the information outweighs the public interest in withholding it.
71. Whilst it is true that this particular inspection was carried out jointly with APHA, either organisation could carry out inspections on their own. The Council does not know why APHA decided to disclose its information or what advice they received regarding that disclosure. That said, the Council maintains its position that disclosure of information of this type risks prejudicing its ability to properly carry out inspections effectively. Moreover, in the vast majority of cases the inspections carried out by the Council's Trading Standards take place without any other organisation present
72. During their investigations, Trading Standard officers try and explore solutions with business owners: In this case to improve animal welfare. This is not because the business is necessarily breaching the law, but where the parties feel that improvements could be made. The Council asserts that these discussions are very useful not only to encourage compliance with the law and standards and to thoroughly investigate to understand if there has been a breach, but to maintain a cooperative approach with businesses.

73. Internal discussions or discussions between enforcement agencies such as the Council and APHA are also important to ensure that such matters are thoroughly investigated. If details of these discussions, or details of internal discussions, were routinely published, then it could put businesses off cooperating so openly with investigations for fear of this information being made public and being misinterpreted in a way that could affect their reputation.
74. The Council's investigatory powers and powers to prosecute are much broader than animal welfare. Trading Standards officers at the Council have powers to enforce legislation in many areas. The fact that there is only one game bird farm in Warwickshire is therefore not relevant to the impact that disclosure could have on the Council's abilities to undertake its differing investigations in an effective manner.
75. Having considered the respective positions of the complainant and the Council, the Commissioner has decided that the balance of the public interest has not changed as a result of the disclosure of information by APHA, nor has the passage of time affected that balance. The Commissioner is content that the public interest favours the continued withholding of the information requested by the complainant on 6 December 2018 and therefore the Council is correct to apply the exemption to disclosure provided by section 30(1)(b) of the FOIA.

Right of appeal

76. 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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

77. 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.

78. 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

**Andrew White
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Wycliffe House
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