

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2020

Public Authority: Animal and Plant Health Agency (APHA)

Address: enquiries@apha.gov.uk

Decision (including any steps ordered)

1. The complainant requested information in relation to photos of farmed salmon and salmon farms from the Animal and Plant Health Agency (APHA), an executive agency sponsored by the Department for Environment, Food and Rural Affairs, the Scottish Government and the Welsh Government. APHA confirmed that it does not hold any photographs taken during inspections and therefore no correspondence relating to those photos was held either. APHA confirmed it does hold photos received as part of welfare allegations/complaints from third parties however it withheld this information under section 31(1)(g) with subsection 2(a), section 40(2) and section 43 FOIA.
2. The Commissioner's decision is that APHA has correctly applied section 31(1)(g) with subsection 2(a) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 16 September 2019 the complainant made a request for the following information:

"Please provide information since 1 January 2018 in relation to photos of farmed salmon and salmon farms. Please include photos obtained via APHA inspections, unannounced site visits, email correspondence with salmon farming companies, whistleblowers & vets and other sources. Please include correspondence, emails, letters, press briefings and other information relating to photos including the non-disclosure

- and non-publication of photos. Please include any legal correspondence with lawyers acting for salmon farming companies”.
5. On 11 October 2019 APHA responded. It withheld information under section 38, 40 and 43 FOIA.
 6. The complainant requested an internal review on 25 October 2019.
 7. APHA sent the outcome of its internal review on 10 March 2020. It said that the response dated 11 October 2019, should not have indicated information was held as requested, by applying exemptions. It confirmed that APHA does not hold any photographs taken during inspections and therefore no correspondence relating to those photos was held either. APHA confirmed it does hold photos received as part of welfare allegations/complaints from third parties however it withheld this information under section 30/31 FOIA. It withdrew the application of section 38 but in addition to section 30/31 it upheld the application of section 40 and 43 FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 23 April 2020 to complain about the way his request for information had been handled.
9. During the course of the Commissioner’s investigation APHA withdrew its application of section 30 FOIA. It applied section 21 FOIA to some information but subsequently provided this information to the complainant outside of its obligations under FOIA.
10. The Commissioner has considered whether APHA was correct to refuse to disclose the remaining information which was withheld under section 31(1)(g) with subsection 2(a), section 40(2) and section 43 FOIA.

Reasons for decision

11. APHA has argued that the withheld information is exempt on the basis of section 31(1)(g) which provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority the functions set out in 31(2) of FOIA.
12. The purposes that APHA has argued would be likely to be prejudiced if the information was disclosed are the following within section 31(2):

- (a) the purpose of ascertaining whether any person has failed to comply with the law.
13. In order for section 31(1)(g) of FOIA to be engaged APHA must be able to demonstrate that the potential prejudice being argued relates to the interest identified above.
 14. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur.
 15. APHA has stated that they believe the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on APHA to discharge, it still requires it to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
 16. The Commissioner has first considered whether APHA is formally tasked with ascertaining whether any person has failed to comply with the law.
 17. APHA explained that it is the national regulator in Great Britain responsible for the delivery of government policies on animal health and welfare on behalf of the Department for Environment, Food and Rural Affairs (Defra), Scottish Government and Welsh Government. For fish welfare it operates under The Animal Health and Welfare (Scotland) Act 2006 which is an Act of the Scottish Parliament to amend the Animal Health Act 1981, including by making provision for preventing the spread of disease; to make provision for the welfare of animals, including for prevention of harm; and for connected purposes. Under this Act, the definition of animals is a vertebrate other than man (it confirmed that fish are vertebrates).
 18. It went on that APHA's role is to investigate any welfare complaints. The information gathered at the time of any subsequent visit is the information that would be used, if appropriate, to forward to the relevant authorities(e.g. a Local Authority) to take any further proceedings, should that be necessary.
 19. The withheld information consists of welfare complaints sent to APHA by members of the public regarding specified individuals/businesses.
 20. The Commissioner is satisfied that APHA is formally tasked with making provision for the welfare of animals and that it is provided with the withheld information for this purpose to ascertain whether any person

has failed to comply with the law and if so to refer the matter to the relevant authority to take forward further proceedings as appropriate.

21. The Commissioner has therefore gone on to consider how disclosure would be likely to prejudice this function.
22. APHA explained that at the time of the request there were no investigations ongoing by APHA relating to the individuals/businesses subject to the allegations. If APHA were to disclose alleged information relating to the names of individuals and businesses which had been identified by members of the public as committing breaches of animal welfare, this would be likely to prejudice other authorities with any investigations ongoing. The release by APHA of alleged welfare incidents would publicly make the information available, which was unconfirmed by APHA and which may pre-empt other authorities' conclusions in any future investigations. This would be likely to hinder the co-operation of the persons or businesses involved which may jeopardise APHA's role in rectifying breaches or the future investigations and outcomes.
23. APHA also needs to continue to have members of the public provide it with concerns of suspected animal welfare issues to enable it to discharge its functions effectively. To do this the public needs to have confidence that information provided when reporting their concerns will be held in confidence and that nothing they report to will be released and possibly identify them. It provided evidence to the Commissioner of such a concern being raised by a member of the public when providing APHA with animal welfare information.
24. A further concern raised by APHA is the possible damage to the individuals/businesses reputation and commercial interests. It said that an allegation made is not confirmed or otherwise. On receipt of allegations, APHA considers a visit. Should any non-compliances be found, the business is given time to correct the issues. If allegations and unverified photographs were released and any welfare issues (those alleged or otherwise) had been found and corrected, it may cause unnecessary negativity to the business.
25. With regard to the specific circumstances of this case, whilst the Commissioner notes APHA's concerns, in the context of its application of section 31(1)(g) with subsection 2(a), the only prejudice claimed that would be likely to prejudice APHA's ability to ascertain whether any person has failed to comply with the law is if disclosure negatively impacts the willingness of members of the public coming forward with allegations in the future. This is because this would be likely to impact the number of notifications or 'tip offs' which may lead to non-compliance going undetected.

26. The Commissioner does therefore accept that disclosure would be likely to result in the prejudicial effects to APHA's purposes described at sections 31(2)(a) of FOIA. As section 31 is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

Arguments in favour of disclosing the information

27. APHA recognises that there is a public interest in disclosure of the photographs in order to increase transparency and aid well-informed debates concerning our work on investigating farm welfare complaints.

Arguments in favour of maintaining the exemption

28. At the time of receiving the photographs from the third parties no inspections had been carried out to prove or disprove the allegations and therefore release of the allegations at that time would have been likely to disrupt this process or mechanism of obtaining information going forwards and therefore APHA's ability to carry out its functions under the Animal Health and Welfare (Scotland) Act 2006.

Balance of the public interest

29. The Commissioner considers that there is a strong public interest in APHA operating openly and being accountable in its effectiveness in carrying out its statutory functions and in ensuring it is acting upon allegations provided to it by members of the public.
30. The Commissioner does consider that there is a strong public interest in not disclosing information which would be likely to impede APHA's ability to carry out its functions effectively. Therefore disclosing information which would be likely to frustrate the voluntary flow of information would not be in the public interest.
31. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 31(1)(g) with subsection (2)(a) FOIA was correctly applied in this case to the withheld information. The Commissioner has not therefore gone on to consider the application of any of the other exemptions any further.

Right of appeal

32. 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

33. 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.
34. 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.....

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF