

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 April 2015

Public Authority: Leicestershire County Council
Address: County Hall
Glenfield
Leicestershire
LE3 8TG

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation regarding horse meat in Asda Smart Price Corned Beef. The Commissioner's decision is that Leicestershire County Council has correctly applied the exemption at section 30(1)(b) where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of 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. The Commissioner does not require any steps to be taken.

Background

2. In a previous investigation¹, where the request was for 'reports' on the issue of horse meat in Asda Smart Price Corned Beef, the council informed the Commissioner that the only report it held was the Public Analyst's Report and the Commissioner decided that the council correctly applied the exemption for investigations and proceedings conducted by public authorities at section 30(1)(b) of the FOIA but in all

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/971654/fs_50518770.pdf

the circumstances of the case, the public interest in maintaining the exemption did not outweigh the public interest in disclosure of the information. The Commissioner therefore ordered disclosure of the identified report. A request was then made for 'full reports' on the matter and when the council responded that no further information was held a subsequent complaint was made to the Commissioner. The Commissioner's decision in that subsequent case² was that on the balance of probabilities, the council does not hold any further reports.

Request and response

3. During a conversation with Mr Sharp on 4 June 2014, the following request was verbally received:
 1. Copies of all correspondence, including emails, reports and letters between Leicestershire County Council and Asda regarding the analysis in 2013 of "Asda smart price corned beef" where over 50% of horse meat was identified.
 2. Evidence as to why the decision was made not to prosecute Asda
 3. Who made the decision not to prosecute Asda
4. The council wrote to the complainant on the same day to clarify the information requested. It asked the complainant to confirm the request by signing and returning its letter.
5. On 1 August 2014, the council provided a response to each part of the request as follows:
 1. It provided redacted versions of correspondence dated 22 May 2013 (from Asda) and 18 July 2013 (from Trading Standards). It withheld information under section 30 of the FOIA. It said that "We would regard the letter as part of the investigation process which has been refused in the past and was part of the decision of the ICO on 19 March 2014".
 2. It said that "the evidence was part of the investigation and previously refused as above and remains exempt under section 30".

² https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1038560/fs_50543851.pdf

3. It informed the complainant that the decision was made by Keith Regan, Trading Standards Manager.

Scope of the case

6. The complainant wrote to the Commissioner on 28 October 2014 to complain about the way his request for information had been handled.
7. The Commissioner telephoned the council at the end of November 2014 to enquire whether an internal review had been requested. He was informed that it had not. Given the history of the matter, it was agreed that the complaint could be investigated without an internal review taking place.
8. In correspondence to the council, the Commissioner noted that during the investigation of case reference FS50518770 (where section 30(1)(b) was considered by the ICO), the only information supplied to the Commissioner by the council was the Public Analyst's Report and therefore the decision regarding section 30(1)(b) in that case was only in relation to that Public Analyst's Report. It did not include any other 'evidence as to why the decision was made not to prosecute Asda' as the council appear to suggest in its response to this request.
9. During the Commissioner's investigation, the council clarified that it is relying on the exemption at sections 30(1)(b), 43(2) and 41 to withhold the information requested at parts 1 and 2 of the request.
10. The Commissioner has first considered whether the council was correct to apply the exemption at section 30(1)(b) where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of 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.
11. As the Commissioner has found that the exemption at section 30(1)(b) applies in this case, he has not deemed it necessary to consider the exemptions at sections 43(2) and 41.

Section 30 - Investigations and proceedings conducted by public authorities

12. Section 30(1) provides 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 –
(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...”

13. The withheld information in this case is correspondence between the council and Asda from 12 March 2013 to 18 July 2013 and includes a Campden Grading report and chemical/microbiological test report. The council has explained that it was under a statutory duty to undertake an investigation into the consumer complaint regarding the product in question but has the discretion to determine whether it is appropriate to proceed with a prosecution. It said that the complaint was investigated under the provisions within the following legislation:

- Food Safety Act 1990
- Food Labelling Regulations 1996
- Meat Products (England) Regulations 2003

15. The council was principally investigating the possible commission of the following offences under the Food Safety Act 1990 which are indictable offences that may be dealt with in the Crown Court and carry maximum sentences of up to two years in prison for each charge:

- Section 8 (selling food not complying with safety requirements)
- Section 14 (selling food not of the nature or substance or quality demanded)
- Section 15 (falsely labelling food)

16. The council confirmed that the withheld information in this case relates entirely to the above investigation and no other purposes. It explained that the investigation was completed on 11 June 2013 when the council confirmed that it had reviewed Asda's response to the investigation and had decided not to proceed with the prosecution.

17. Due to the phrase 'at any time', the Commissioner considers that is irrelevant for the application of section 30(1)(b) that the investigation was complete at the time of the second request. What is relevant is whether the information was held at some point for the purposes of the investigations. Additionally, the fact that no prosecutions materialised does not affect the applicability of the exemption.

18. As section 30(1)(b) is a class-based exemption it is not necessary for the council to demonstrate that disclosure would prejudice any particular interest in order to engage the exemption.
19. Taking the above into consideration, the Commissioner is satisfied that that the information requested was held as part of an investigation being conducted by the council, with the potential for criminal proceedings to be instituted which the council has to the power to conduct. He therefore considers the section 30(1)(b) exemption to be engaged in respect of the withheld information.

The public interest test

20. As section 30(1)(b) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the FOIA. This favours disclosure unless;

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”.
21. The starting point is to focus on the purpose of the relevant exemption. With section 30(1)(b) this involves weighing the prejudice that may be caused to an investigation or prosecution, or more generally to the investigatory and prosecution processes of the public authority, against the public interest in disclosure. There is general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of criminal matters.

Public interest arguments in favour of disclosing the requested information

22. The Commissioner is mindful of the public interest in promoting openness and transparency in the discharge of a public authority's statutory functions. For example, disclosure of the requested information may enable the public to understand why a particular investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out. In this case, disclosure would ensure that the council is held to account for this particular investigation into Asda Corned Beef.
23. The council said that it has considered the general arguments in relation to accountability and transparency in relation to which disclosure would present a 'full picture' and allow people to reach their own view. It said that in general terms, it would expect to be entirely transparent with concerned stakeholders in relation to its reasons for taking or not taking action but believes that the management of this investigation and the

decisions made does not have a widespread or significant impact on the public. It said that the material requested is not relevant to a matter of policy of wider application to the public generally but is narrow and restricted to the particular circumstances of this case.

Public interest arguments in favour of maintaining the exemption

24. The council said that it is important to note that it is the Enforcement Agency and if further offences involving Asda require investigation the council may at any time, without time bar, wish to rely on the withheld material to provide a witness statement either for its own enforcement duties, or for another Food Authority, to be taken into account in establishing whether Asda is able to satisfy the section 21 'due diligence' defence under the Food Safety Act 1990. It said that disclosure of the withheld material would have a real and significant potential to affect the ability of the council to rely on this information in any future proceedings. This would adversely affect the public interest in enforcing food safety and consumer protection legislation.
25. In addition, the council also said that if further transgressions by Asda are identified within the limitation period, the findings of the original investigation weigh in the balance of a public interest assessment of whether it is appropriate to prosecute either or both the original and subsequent offences.
26. The council said that individuals and organisations who are subject to investigation cooperate with that investigation process because they have an assurance (by implication if not expressly) that the information they provide will be treated confidentially and that cooperation is important to the regulatory process and disclosure of such material will affect how organisations engage with the investigatory process.
27. The council explained that it has a range of measures in place to enhance transparency, accountability and public confidence including publishing details of its investigations policies, its performance and details of the outcomes of prosecuted cases. It said that the public interest in its operation of its statutory enforcement functions under the Food Safety Act 1990 can be satisfied by the publication of the Council Trading Standards Service 'Plan for Enforcement of Food and Animal Feeds Standards 2014/15'. The council considers that there is nothing to suggest that the investigation has not been properly conducted or has been anything less than vigorous and in accordance with proper process, nor is there any suspicion of wrong-doing on the part of the council.
28. In relation to the sensitivity and significance of the information, the council said that Asda have co-operated with the investigation in full and the council decided that it was not appropriate to proceed with a

prosecution and no criminal proceedings were brought. It said that this reduces the public interest in release of the information as compared to a situation where the investigation has found evidence of wrongdoing. It further explained that the investigation involving Asda necessarily involved a limited number of Asda's senior staff and Asda's legal advisors but it believes that the overwhelming majority of staff will not have been privy to the substance of the communications. It said that the unfettered release of information into the public domain potentially reduces future monitoring and surveillance of Asda in so far as it may encourage staff to conceal relevant evidence or documentation.

29. The council said that it has taken into account the fact that the complainant has, in other correspondence, requested 'significant compensation' from the council. It said that this demonstrates that the request may be in the complainant's private interests but it does not follow that the request is in the wider interest of the public. It further said that the purpose of the FOIA is not designed to allow potential litigants an opportunity to undertake a 'fishing expedition' for documents that can be used to bring claims against the council or others and said that if the complainant wants to bring a claim against the council he can rely on the pre-action disclosure procedure under Part 31.16 of the Civil Procedure Rules.
30. The Commissioner notes that section 30 is concerned primarily with preserving the integrity of certain proceedings and investigations which public authorities have the power or duty to conduct and therefore recognises that there is an inherent public interest in ensuring the ability of public authorities to carry out investigations.

Balance of the public interest arguments

31. In relation to the council's arguments at paragraph 24 and 25, the Commissioner considers that if the effective enforcement of food safety and consumer protection regulations is jeopardised then this has a clear public interest implication in terms of harm caused to individuals. He also agrees with the council that the information in this case does not lose its relevance even though the investigation is closed due to the potential for the information to be used in future proceedings. He does not believe that in all circumstances the older the information is the less risk of prejudice there is. There is always the possibility that the status of an investigation can change over time and that information has the potential of becoming relevant again.
32. In relation to the council's arguments at paragraph 26, the Commissioner considers that divulging information collected in the course of an investigation is likely to degrade that trust between the council and the organisations it has the power to investigate which

would prejudice the council's ability to conduct investigations and it is in the public interest to safeguard a co-operative investigatory process. He is also aware that whilst councils have significant enforcement powers, much investigatory and enforcement work is more successfully completed with the co-operation of the companies involved and considers that the disclosure of the requested information could erode working relationships.

33. The Commissioner has considered the council's argument at paragraph 27. He notes that whilst general information relating to the methods engaged by the council in seeking compliance with relevant legislation is in the public domain, which goes some way to addressing the public interest in ensuring transparency and accountability, only limited information about the specific investigation is publically available. Such information is the Public Analyst's Report which was the subject of a previous decision as detailed in paragraph 4. Therefore, the withheld information would add to the public's understanding of the council's in respect of this particular investigation. Disclosure of the requested information would also ensure that the council is held to account for this particular investigation. In view of this the Commissioner considers that the arguments in favour of releasing the withheld information deserve some weight.
34. In relation to the argument at paragraph 28, the Commissioner considers that, on the one hand, due the fact that the council did not deem criminal proceedings appropriate, there is less public interest in release of the information as compared to a situation where the investigation has found evidence of wrong doing. On the other hand, the Commissioner believes that the fact the information does not contain anything which could lead to the institution of criminal proceedings would reduce the likelihood of harm occurring to the investigatory process through its disclosure. He considers that if the information was of greater significance to the institution of criminal proceedings, the greater the likelihood of harm to the investigatory process, should it be disclosed. However, as stated above, the arguments in favour of maintaining the exemption focus on the protection of the investigatory and prosecution processes of the council rather than the protection of a specific investigation or prosecution. There is considerable public interest in a matter such as contravention of food safety regulations being investigated as thoroughly and efficiently as possible and in prosecutions not being prejudiced by the premature disclosure of information under the FOIA. It is important for public confidence in the activities of the council that its ability to discharge its statutory functions should be effective and unimpeded.
35. In relation to the argument at paragraph 29, the Commissioner considers that when determining whether a public authority should

disclose information in response to a request, the issue is whether it is in the public interest to disclose that information to the public at large. He does not consider an argument in relation to pursuing a claim to be relevant because it relates to the private interests of the complainant as opposed to the public interest in disclosure. It should be made clear that the Commissioner's concern is not with the private interest of individuals. Whilst the requested information is clearly of interest to the complainant, this does not necessarily mean that there is a wider public interest that would be served by its release.

36. Having taken all of the above into consideration, the Commissioner considers that there is considerable public interest in matters such as contravention of food safety regulations being investigated as thoroughly and efficiently as possible and ensuring that the best evidence is available to the council to inform its decisions. It is important for public confidence in the activities of the council that its ability to discharge its statutory functions should be effective and unimpeded. There will be cases where, the balance of public interest will run in favour of disclosure but the Commissioner is not satisfied that this is such a case. In all the circumstances of this case the Commissioner is of the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information requested. The Commissioner therefore finds that the council was entitled to withhold the requested information under section 30(1)(b).

Right of appeal

37. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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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