

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 January 2023

Public Authority: Animal and Plant Health Agency
Address: Woodham Lane
New Haw
Addlestone
Surrey KT15 3NB

Decision

1. The Commissioner's decision is that the Animal and Plant Health Agency is entitled to rely on section 38(2) and section 43(3) of FOIA to neither confirm nor deny it holds the requested information about culling of pigs at a named farm. To do so would be likely to endanger another individual's health or safety and would be likely to prejudice another person's commercial interests.

Request and response

2. The complainant made the following information request to the Animal and Plant Health Agency (APHA) on 18 July 2022:

"This is a freedom of information request.

Ref: [name of farm redacted]

- 1) Please confirm whether the Secretary of State granted [redacted] any derogation under Article 18(3) of Council Regulation (EC) No 1099/2009 (PATOK) to kill pigs on the farm in June/July 2022, as part of a depopulation operation.

- 2) In the event a derogation was granted please provide the following information:
 - a) The provisions of PATOK and the Welfare at The Time of Killings Regulations that were subject to the derogation
 - b) Any conditions on which the derogation was granted
 - c) How the welfare of the pigs was considered under the derogation
 - d) A copy of the derogation notice"
3. The APHA's final position in its correspondence with the complainant was to neither confirm nor deny it held the requested information under section 43(3) of FOIA.
4. APHA subsequently advised the Commissioner that it also wishes to rely on section 38(2) of FOIA to refuse to confirm or deny it holds the requested information.

Reasons for decision

5. This reasoning focusses on APHA's reliance on section 38(2) and section 43(3) of FOIA.
6. Under section 1(1)(a) of FOIA a public authority must confirm whether or not it holds information an applicant has requested; this is known as 'the duty to confirm or deny'.

Section 38 – health and safety

7. Under section 38(2) a public authority does not have to comply with section 1(1)(a) if even act of confirming whether or not information is held would, or would be likely to, endanger the physical or mental health of any individual, or endanger the safety of any individual.
8. In its submission to him APHA has told the Commissioner that the farm named in the request has experienced the selective use of information about its operations. It provided the Commissioner with links to where some of this information is published; in national media, Facebook and Twitter.
9. APHA says that, on reconsideration it is concerned that confirming or denying it holds the requested information would be likely to endanger the health and safety of individuals. This is because: the farm is named in the request; information about the farm is already in the public domain and because pig farming is a sensitive subject matter. APHA says it considers confirming or denying would be likely to cause upset to the owners of the farm to the point that this would endanger their

mental health. Confirmation or denial would also be a likely risk to employees' safety at the premises due to the concern of animal right protesters. As some of the published information indicates, vigils took place in 2022 at other premises associated with the company of which this farm is a subsidiary.

10. The Commissioner recognises the sensitive subject matter that this request refers to and the sometimes febrile nature of the debate. He is therefore prepared to accept APHA's reasoning and has decided that the exemption from the duty to confirm or deny provided by section 38(2) is engaged. He has gone on to consider the public interest.
11. APHA believes that protecting an individuals' health and safety outweighs the public interest in confirming or denying whether it holds information about a derogation. The Commissioner agrees. He has found that confirming or denying whether APHA holds the requested information would be likely to endanger an individual's or individuals' health and safety. The public interest in confirmation or denial would have to be extraordinarily great to justify endangering another's health and safety. The Commissioner does not consider that threshold is anywhere near met in this case.
12. Although he has found that section 38(2) is engaged and that the public interest favours maintaining this exemption, the Commissioner has also considered APHA's reliance on section 43(3).

Section 43 – commercial interests

13. Under section 43(3) of FOIA a public authority can refuse to confirm or deny it holds information if to do so would, or would be likely to, prejudice another person's commercial interests.
14. In its submission to the Commissioner APHA has again noted that the culling of pigs is a sensitive subject matter and is sometimes referred to within the public domain as 'animal abuse'. APHA has provided the Commissioner with links to such published information.
15. APHA believes that negative public coverage can threaten a business' reputation. The coverage is sometimes not based on facts and has a lack of understanding about what the situation is.
16. APHA has provided the complainant with further reasoning to support its reliance on section 43 which the Commissioner has taken into account but does not intend to include in this notice.
17. In their request for an internal review the complainant first disputed that APHA's commercial interests would be harmed. The complainant went on to discuss what they understood to be related circumstances at the farm

identified in the request. They also said that the farm does not sell directly to the public, does not have any brand awareness with the end consumer and that products are not branded as coming from the farm. In the complainant's view because of that and the circumstances they discussed it was therefore evident that the harm to any commercial activity would not be caused by confirming or denying APHA holds the requested information. The complainant has put forward similar views in their complaint to the Commissioner.

18. The Commissioner has considered APHA's and the complainant's views. He is satisfied first, that the harm APHA envisages relates to commercial interests; those of the farm in question and the company of which it is a subsidiary.
19. Second the Commissioner accepts that a causal link exists between confirmation or denial and commercial prejudice. If, under FOIA, APHA confirmed whether or not it held information in scope of the request it would, in effect, indicate to the wider world whether or not the farm named in the request was granted a derogation to cull pigs as part of a depopulation operation. Confirmation or denial would be likely to prejudice the farm's commercial interests because it would be likely to result in negative publicity about the farm which may also be incorrect or not based on the facts of the situation. The farm's and the company's competitors could use this to their advantage and the farm's/company's commercial interests could be undermined.
20. APHA's position appears to be that it considers the envisioned prejudice would be likely to happen; this is a level of likelihood that the Commissioner accepts.
21. Having considered the above factors and all the circumstances, the Commissioner's decision is that APHA is entitled to rely on section 43(3) of FOIA to neither confirm nor deny it holds the requested information and he will go on to consider the associated public interest test.
22. APHA recognises that there is a public interest in confirming whether or not it holds information about a disease investigation. It says it also understands that there is a widespread public interest in animal welfare in the UK.
23. However APHA argues that there is a stronger public interest in neither confirming nor denying whether it holds the requested information. APHA says it is important that commercial entities are able to communicate with it without fear that any discussions or information might be released. Doing so could also harm APHA's relations with commercial businesses when working with them to safeguard animal

health and welfare for the benefit of people, the environment and the economy.

24. APHA has provide the following example. Together with Defra, it continues to work towards improving animal welfare and publishes information such as the new Animal Health and Welfare Pathway. This will push forward and support the gradual and continual improvement in farm animal health and welfare, including the welfare of farmed pigs.
25. In their request for an internal review, the complainant argued that APHA regulates farm business. They said that this is a public function, not a private arrangement between APHA and the farms it regulates. As such, they said, farms have no option but to cooperate with APHA and APHA has all the powers it needs to ensure compliance.
26. The complainant argued that the public is overwhelmingly concerned about farm animal welfare, there is a strong interest in being able to scrutinise that any derogation was appropriately granted. If no derogation was granted, the public has an equally strong interest in understanding why the cull "with the large-scale suffering it caused" took place.
27. The complainant also argued that public health is of huge importance to the British public and the public has a right to know of any threats. COVID-19 has underlined the risk to public health from zoonotic diseases.
28. Third, the complainant said that there has been "no derogation in England from welfare at the time of killing standards since 2013", which they said is the earliest record available. In the complainant's view it is therefore of significant public importance if this trend has been deviated from, as it suggests a significant threat to public health that rendered such a derogation necessary.
29. Finally, the complainant considered they were entitled to assess whether any derogation was lawfully granted and, if it was not, to take appropriate steps.
30. The Commissioner has considered the complainant's and APHA's arguments. The Commissioner appreciates that the complainant, like the majority of people in the UK, are concerned about animal welfare including the welfare of farmed animals. That public interest is satisfied to a sufficient degree in this case through the work of a number of bodies that work with farms – including APHA, Defra and the RSPCA. And indeed, through the activities of individuals and groups who advocate for farm animals and raise public awareness about particular concerns.

31. In this case the Commissioner considers that there is greater public interest in farms being prepared to cooperate and engage willingly with APHA, without the need to use more formal processes to ensure that farms engage. Cooperating with APHA helps ensure that a farm remains commercially competitive by having, or putting, in place practices that safeguard animal health. There is also a public interest in not undermining the competitiveness of the farm in this case, or the company of which it is subsidiary, through generating potentially negative, and perhaps incorrect, publicity. Finally, there is a strong public interest in ensuring that the UK has a strong rural economy and farming, including the farm in this case, is a significant part of that. On balance therefore, the Commissioner considers that there is greater public interest in maintaining the section 43(3) exemption.

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

Cressida Woodall
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Wycliffe House
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