

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2011

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

Decision (including any steps ordered)

1. The complainant has requested information relating to clone offspring meat for human consumption.
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), section 43(2) and section 40(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 requires no steps to be taken.

Request and response

5. The complainant requested the following information on 17 September 2010:
 - i. The names of all farmers who currently have a clone descendant on their farm.
 - ii. The names of all meat processors who processed clone offspring meat for human consumption.
 - iii. The names of all wholesalers, butchers or other retailers supplied with this meat both in the UK and in Europe.

- v. The details of correspondence between the FSA and all interested parties on this issue, including government ministers, Scottish authorities, Holstein UK and dairy industry representatives.
6. The FSA provided a response to the complainant on 7 October 2010 in which it refused to comply with the request under section 12 of the Act as it would exceed the cost limit to do so. It provided advice and assistance as to how the request could be refined to fall within the cost limit. On the same date the complainant wrote to the FSA with a refined request for information. Points 1, 2 and 3 were unchanged however point 4 was refined.
7. On 2 December 2010 the FSA wrote to the complainant with a response to the refined request. It refused to provide the information requested at points 1, 2 and 3 of the request. In relation to point 4 of the request the FSA withheld some information but did provide the complainant with some information relevant to this part of the request. It explained that the information which was withheld was exempt from disclosure under section 31(1)(g) with section 31(2)(a) and (c), section 40(2), section 43(2), section 21, section 44, section 27, section 42 and section 35(1)(a) and (b). On the same date, as the complainant was dissatisfied with the response he had received in relation to points 1, 2 and 3 of the request he asked the FSA to carry out an internal review. On 7 March the FSA wrote to the complainant with the result of the internal review it had carried out in relation to points 1, 2 and 3 of the request. It withheld the information under section 31(1)(g) with section 31(2)(a) and (c), section 30(1)(a) and (b), section 43(2), section 40(2) and section 38(1)(a) and (b).

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner will consider whether or not the FSA was correct to withhold the information requested at points 1, 2 and 3 of the request.

Background

9. The FSA has explained that food from cloned animals falls under the general definition of a "novel food" in the EU Novel Food Regulation (Regulation (EC) 258/97). It said that the FSA is the competent authority for novel foods and is responsible for implementing EU food safety legislation in the UK. It explained that the Novel Foods and Novel Food Ingredients Regulations 1997 (S.I. 1335) (the Regulations) are the

UK's implementing regulations for Regulation (EC) 258/97. It explained that as a novel food, meat and milk from cloned animals must undergo a safety assessment and authorisation before being placed on the market. However it highlighted that the situation was less clear for the descendants of cloned animals (which are produced using conventional reproductive techniques), which lead to differing interpretations in EU Member States.

10. The FSA went on to explain that in August 2010 it was reported in the press that food from the offspring of cloned cows was on sale in the UK. It said that at the time of the incident, it was the UK's view that meat and milk from the offspring of cloned animals should be authorised under the Novel Food Regulations. As no application for assessment and authorisation had been made to the FSA it conducted an investigation. As a result it traced animals that had been born in the UK from embryos of a cloned cow in the USA and imported into Britain.
11. Furthermore it explained on 15 September 2010 the FSA Board had agreed to reconsider the interpretation of the Regulations in relation to whether meat and milk from the descendants of cloned animals requires prior authorisation. Therefore at the time of the complainant's request on 17 September 2010 the UK's position was uncertain. The FSA explained that after further discussions and assessments, in December 2010 the FSA Board agreed that it was minded to adopt the position taken by the European Commission and others that food obtained from the descendants of clones of cattle and pigs did not require authorisation under the Regulations. It said that this position was confirmed in the FSA Board meeting in May 2011.

Reasons for decision

12. 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). 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 may arise. The Commissioner is satisfied that the FSA does have a relevant function described at paragraph 9 above. The Commissioner must therefore 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.
13. The FSA explained that the names requested at points 1, 2 and 3 of the request, were identified by the FSA during the course of its

investigations in August 2010 into whether food from the descendants of cloned animals had entered the food chain in contravention of the UK's then interpretation of the Regulations. However it said that the Regulations are enforced by local authorities under the provisions of the Food Safety Act 1990 (s.5). It explained that decisions on prosecutions in relation to the Regulations are taken by local authorities in line with the Code for Crown Prosecutors in England and Wales. It said that in Scotland the final decision rests with the Procurator Fiscal (on receipt of a report from a local authority).

14. The FSA explained that at the time the request was received disclosure of the names of the businesses highlighted as part of the FSA's investigation, would be likely to prejudice local authorities' functions under section 31(1)(g) as specified in subsection (2)(a) and (c). During the time period following the request, it explained that local authorities were still ascertaining whether there had been an infringement of the Regulations and whether prosecutions would follow (subsection (2)(a)) or whether other regulatory action was justified (subsection (2)(c)). The FSA explained that it withheld the names of the farms and businesses as it would be likely to prejudice the local authorities' ongoing investigations. This is because it would publicly make information available which may interfere with or jeopardise the ongoing investigations by pre-empting the local authorities' considerations of whether or not any of the businesses involved in the incident had infringed the Regulations. It explained that the importance of protecting a local authority's functions in relation to their enforcement powers in these circumstances is recognised in the FSA's protocol 'Communicating during an incident'. The FSA must warn local authorities in advance if it intends to make information public which is relevant to an incident and therefore relevant to a local authority's investigation.
15. In addition the FSA highlighted that in this case, in November 2011, the local authority at the centre of the incident confirmed that the farmer relevant to their investigation would not be prosecuted. The other local authorities involved in these investigations also confirmed that prosecutions would not be pursued.
16. The Commissioner considers that at the time of the request the local authorities' investigations were ongoing. If the FSA were to disclose information relating to the names of farmers and businesses which it had identified as part of its investigation, this would be likely to prejudice the local authorities ongoing investigations. This is because this would publicly make information available which may pre-empt the local authorities' conclusions. The Commissioner considers that this would be likely to hinder the co-operation of the farmers or businesses involved which may jeopardise the ongoing investigations and ultimate outcomes.

17. The Commissioner is aware the FSA has argued that the prejudice would be likely to occur in this case. As the local authorities investigations were ongoing at the time of the request, the Commissioner considers that this increases the likelihood of the prejudice occurring.
18. 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

19. The FSA recognised the general public interest in maintaining confidence in law enforcement. It explained that public confidence can be increased through greater transparency in the enforcement process.
20. The Commissioner also considers that there is a public interest in disclosure to inform public debate surrounding this issue.

Public interest arguments in favour of maintaining the exemption

21. The FSA argued that there is a public interest in safeguarding the investigatory process and to preserve the integrity and effectiveness of the investigations that local authorities carry out.
22. The FSA has argued that there is a public interest in it applying principles of fairness and Human Rights Act requirements (eg. right to a fair trial) to a farmer or business under investigation.
23. In this case the FSA has highlighted that there was a decision not to prosecute the farmers and businesses involved.
24. It finally argued that there is a public interest in maintaining confidence between those who assist law enforcement authorities by being able to supply information in confidence. It explained that in this case the FSA's ability to trace the food from the offspring of cloned animals benefitted from the co-operation of the food businesses involved. Some of those bodies involved have confirmed that disclosure could deter co-operation in the future which would not be in the public interest.

Balance of public interest arguments

25. 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.

26. The Commissioner does however consider that there is a strong public interest in safeguarding the investigatory process and not disclosing the names of farmers or 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 ongoing investigation as well as ensuring that those involved provide full co-operation to relevant enforcement authorities.
27. In this case the Commissioner considers that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
28. As the Commissioner has decided that all the withheld information has been correctly withheld under section 31(1)(g) he has not gone on to consider the application of the other exemptions by the FSA.

Right of appeal

29. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

30. 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.
31. 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

Gerrard Tracey
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