

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 July 2009

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

Summary

The complainant requested a number of pieces of information from the public authority in relation to a review into the safe cooking time and temperature for burgers. The public authority disclosed some information but withheld other information on the basis of sections 22, 35, 40 and 41. During the course of the Commissioner's investigation further information was disclosed to the complainant. At the conclusion of the investigation the only information that had not been disclosed was contained on a slide from a presentation. This was withheld under sections 41 and 43(2).

The Commissioner determined that sections 41 and 43(2) were not applicable and ordered that the information on the slide be disclosed to the complainant. He also found that the public authority had not complied with section 1(1)(b), as it did not provide the requested information by the time of the completion of the internal review, and section 10(1), as it did not provide the requested information within 20 working days of the request. In addition, it breached section 17(1)(b) and (c), as it failed to state in its refusal notice that it believed that sections 43(2) was applicable to the information requested or explain why it applied.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 10 April 2006 the complainant wrote to the public authority to request a number of pieces of information concerning a review being carried out by an ad hoc working group of the Advisory Committee on the Microbiological Safety of Food ("ACMSF") into the safe cooking time and temperature for burgers. The ACMSF is a statutory committee which provides expert advice to the government on food safety in response to requests from the Food Standards Agency and on significant matters that the members of the ACMSF identify themselves.
3. The request included a request for:-
 - (i) All information/ documentation considered by the ad hoc group (both oral and written); and
 - (ii) If not covered by the above, the documentation submitted by the US burger chain to the FSA/ ACMSF/ ACMSF ad hoc committee.
4. On 10 May 2006 the public authority wrote to the complainant and provided some information but withheld other information on the basis that it was exempt under sections 22 and 35 of the Act.
5. On 12 May 2006 the complainant requested that the public authority carry out an internal review of its decision.
6. On 7 July 2006 the public authority informed the complainant that as a result of the internal review it was carrying out it had decided to disclose some further information. It also stated that in order to reach a final decision about the remaining information it needed to consult with third parties who had provided information to the ACMSF working group.
7. On 3 August 2006 the public authority wrote to the complainant providing further information and confirming that it was withholding the remaining information under sections 22, 40 and 41.

The Investigation

Scope of the case

8. On 17 August 2006 the complainant contacted the Commissioner to complain about the way its request for information had been handled.
9. The complainant expressed particular concern that the ACMSF's ad hoc working group had been set up following a request for a review of the current recommended cooking times and temperatures by a US fast food company. The company had then submitted evidence to the working group. When the complainant requested details of this information in order to review the evidence

already presented to the working group and to enable him to respond to a public consultation on the issue, it was refused. Without this information the complainant believed that a full response could not be provided to the consultation.

10. During the course of the investigation the public authority confirmed that it had withheld two research papers under section 22. It also withheld a slide from a presentation, a research report from 1997 and a letter and research report from 2004 under sections 41 and 43(2).
11. During the course of the Commissioner's investigation the public authority released all the information it had withheld, with the exception of the slide from a presentation. The focus of this notice was therefore limited to determining whether the public authority had correctly withheld this slide under sections 41 and 43(2).

Chronology

12. There were a large number of communications between the Commissioner, the public authority and the complainant. The most significant communications are outlined below.
13. On 21 September 2007 the Commissioner wrote to the complainant seeking confirmation as to which information it believed was still being withheld by the public authority. He explained that this was necessary because of the significant amount of information held by the public authority in relation to the request and the fact that the public authority had disclosed additional information subsequent to the internal review, after further correspondence with the complainant.
14. On 28 September 2007 the complainant responded to the Commissioner identifying the information it believed had been withheld by the public authority. It also raised concerns about the piecemeal disclosure by the public authority over a period of time since the initial request had been made which had severely hampered its ability to respond to the public consultation exercise on the safe cooking time and temperature for burgers.
15. On 22 October 2007 the Commissioner wrote to the public authority to seek confirmation of the information that had been withheld and detailed arguments as to the basis on which this information had been regarded as exempt from disclosure.
16. On 30 November 2007 the public authority informed the Commissioner that it believed some of the withheld information was exempt under section 22. Other information was exempt under section 41, as it was held under a duty of confidence owed by the public authority to the US fast food company that had provided the information, and section 43(2), as disclosure would have been prejudicial to the commercial interests of the company concerned. It provided detailed arguments in support of the application of the exemptions.
17. On 17 December 2007 the Commissioner wrote to the public authority asking for further information and clarification regarding the application of the exemptions.

18. On 29 January 2008 the public authority provided further details of its arguments for withholding some of the information. It also informed the Commissioner that it believed that it had inadvertently released a copy of a research report provided to it by the US fast food company to the complainant. However, it stated that it still believed this information was subject to a duty of confidence. In addition, it confirmed that it had disclosed further information to the complainant.
19. On 17 April 2008 the Commissioner raised some further queries with the public authority regarding the application of the exemptions. He pointed out that, in relation to one of the reports that was being withheld, the US fast food company had previously informed the public authority that many of the issues that the report raised were in the public domain.
20. On 21 May 2008 the public authority provided a response to the Commissioner's questions. It also confirmed that it had disclosed to the complainant the report about which the Commissioner had raised a query in his last letter.
21. On 22 May 2008 the Commissioner asked the public authority whether he could provide the complainant with a broad indication of the nature of the information on the presentation slide which had been submitted to it by the US fast food company and was being withheld under sections 41 and 43(2). He felt that this would enable the complainant to determine whether this was information it was seeking access to and, consequently, whether it wished to pursue its complaint.
22. The Commissioner also queried whether the public authority held further information which it could be argued fell within the scope of the request if a broader interpretation of the request had been taken.
23. On 30 May 2008 the public authority informed the Commissioner that it could not agree to the suggestion that he had made about providing an indication of the nature of the information on the withheld slide. It believed that to do so would breach the duty of confidence it owed to the US fast food company.
24. The public authority also informed the Commissioner that it had identified two further emails which it could be argued came within the scope of the request. It confirmed that it had disclosed these to the complainant.
25. On 9 June 2008 the Commissioner asked the public authority to provide him with any further arguments it wished to raise in relation to the application of sections 41 and 43.
26. On 11 June 2008 the Commissioner contacted the public authority to point out that details of the findings of the research report, which it was claiming were exempt from disclosure, were contained in the report that the ACMSF had produced following its investigation. This report by the ACMSF was published in July 2006 and was available on the public authority's website.
27. On 16 June 2008 the public authority contacted the Commissioner to inform him that, following consultations with the US fast food company, it was no longer

seeking to argue that the research report was subject to a duty of confidence and exempt from disclosure.

28. On 23 June 2008 the public authority wrote to the Commissioner to inform him that it had written to the complainant to confirm that it was no longer seeking to assert that there was a duty of confidence applicable to the research report which was in the complainant's possession.
29. On 30 June 2008 the public authority forwarded copies of two research papers which had been withheld under section 22 to the complainant.
30. On 4 August 2009 the complainant wrote to the Commissioner to make representations as to the scope of matters that it believed should be covered by his Decision Notice. In addition to the slide provided by the US fast food company as part of its presentation to the ad hoc group of the ACMSF which was still being withheld, it argued that he should make a determination on whether the public authority was entitled to originally withhold other information which it had subsequently disclosed during the course of the Commissioner's investigation.
31. On 7 August 2008 the public authority wrote to the Commissioner to put forward its views as to why it believed that the Commissioner should limit the scope of his Decision Notice solely to whether it was correct to withhold the slide provided by the fast food company.
32. On 19 August 2008, following the receipt of detailed representations from the complainant and the public authority, the Commissioner wrote to the complainant to confirm the scope of the matters which would be dealt with in this notice. He explained that he did not propose to make a determination on whether the public authority was correct to originally withhold the information which had subsequently been disclosed during the course of his investigation as there were no specified steps that he could require the public authority to take in relation to that information. He was therefore of the view that the only remaining matter for him to determine was the application of sections 41 and 43(2) to the slide provided by the US fast food company.
33. On 29 September 2008 the complainant wrote to the Commissioner to ask him to review his decision in relation to the scope of his Decision Notice.
34. On 19 November 2008 the Commissioner wrote to the complainant to confirm his original decision to only make a determination in his Decision Notice in relation to the one remaining piece of information that had been withheld, the slide provided by the US fast food company.
35. On 16 April 2009, following a query from the Commissioner, the public authority confirmed that, in relation to section 43(2), it believed that disclosure of the withheld slide would have been likely to prejudice the commercial interests of the US fast food company that provided it.

Analysis

36. The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this notice. In addition, the relevant points are summarised below.

Background

37. In June 2004 the FSA sought the advice of the ACMSF on the UK's existing guidance on the safe cooking time and temperature for burgers. This followed a suggestion from a US fast food company to the FSA that this guidance recommended cooking conditions that were more stringent than was necessary. The company believed that this led to overcooking and deterioration in the quality of some of its products.

38. In September 2004 the ACMSF set up an ad hoc group to review the advice issued by the Chief Medical Officer. Amongst the evidence it considered was a presentation from the US fast food company on the controls it used to ensure the safety of burgers from raw materials through to consumption. It provided data on the effectiveness of the regime in the US which differed from that in the UK.

39. The ACMSF's draft report was published in July 2006. Public comment was invited on the draft report by October 2006, with a view to the ACMSF reviewing the report in light of any comments that were received. A final version of the report was published in June 2007.

Procedural matters

Sections 1, 10 and 17 – Communication of information and refusal notice

40. Section 17(1)(b) and (c) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should state in its refusal notice which exemptions are applicable and explain why the exemption applies. In this case, the public authority failed, by the time of the completion of the internal review, to state that it was relying on section 43(2), nor explain why it applied. It therefore breached section 17(1)(b) and (c).

41. By not providing the withheld slide to the complainant within 20 working days of the request, the public authority breached sections 10(1). By not providing it to the complainant by the time of the completion of the internal review, it breached section 1(1)(b).

Exemptions

42. At the conclusion of the Commissioner's investigation there was only one document of those which had originally been withheld by the public authority which had not subsequently been disclosed to the complainant. This was a slide from a presentation made by the US fast food company to the ACMSF working

group. It was provided to the public authority by the company on 12 January 2006, one day before the company's presentation to the working group on 13 January 2006.

43. During the course of the Commissioner's investigation the public authority informed him that it was of the view that the disclosure of a broad indication of what was contained on the slide could result in a breach of the duty of confidence it believed it owed to the US fast food company which had provided the information. The Commissioner has therefore only been able to discuss the application of section 41 and 43(2) to the information contained on the slide in very general terms in order to avoid disclosing any information which would breach his obligations under section 59 of the Data Protection Act.
44. The public authority claimed that the slide was exempt from disclosure under sections 41 and 43(2). The Commissioner considered the application of the exemptions to the information contained on the slide.

Section 43(2) – Prejudice to commercial interests

45. The Commissioner considered whether the information that the complainant requested was exempt from disclosure under section 43(2).
46. Section 43(2) provides an exemption from the disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
47. The Commissioner accepts that the withheld information related to the commercial activities of the company and therefore fell within the scope of the exemption contained in section 43(2). He went on to consider the likelihood that the release of the information would have prejudiced the company's commercial activities.
48. The Commissioner is aware that the public authority consulted with the company in preparing its arguments about the application of section 43(2). He was provided with copies of letters from the company in relation to the potential prejudice that it believed it could have suffered from the disclosure of the withheld information.
49. The public authority confirmed to the Commissioner that it was relying on the lower threshold of prejudice, that is that disclosure of the withheld information would have been likely to prejudice the commercial interests of the company.
50. In dealing with the issue of whether disclosure would have been likely to prejudice the commercial interests of the company, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.

51. The correspondence received by the public authority detailed the company's view as to the prejudice that could have been caused by the disclosure of the information. It stated that the information was confidential company data and that disclosure would have been likely to prejudice its commercial interests. This was because, if the information had been released, the data could have been taken out of context and, therefore, misunderstood and misrepresented. This could have resulted in a loss of trust and damage to its reputation.
52. The company also believed that it would have had no control over how the information could have been used. It could have been widely disseminated outside the scientific community without accompanying information to put it in context, causing unjustified and unnecessary public concern.
53. It also argued that the slide was a visual aid used to accompany an oral commentary. The commentary was not scripted. If the slide were to have been released, it would have been without the scientific narrative that accompanied it and would therefore have been misleading.
54. The public authority acknowledged that the information could have been released with an accompanying explanatory statement setting it in context. However, it was of the view that this would not have removed the risk of harm, particularly as selected media bodies would have been likely to ignore such clarification in the interest of providing sensationalist and misleading headlines and reports concerning the company.
55. The Commissioner is generally reluctant to accept arguments for withholding information based on the contention that disclosure might result in the information being misunderstood or that certain parts of the media might seek to misrepresent the information in order to provide sensationalised news stories. His view is that it is always possible to offset the potential for this to happen by issuing an accompanying statement placing the information in context. The Commissioner notes the decision of the Information Tribunal in the case of *Rt Hon Lord Baker of Dorking v ICO and DCLG*, where the Tribunal said: "we hope that we are justified in having equal confidence in the media to deal responsibly with the information that falls into their hands as a result of government now being conducted in a more public manner." The public authority has not put any evidence forward to suggest to the Commissioner that this statement should be challenged. The Commissioner has also considered the fact that the Press Complaints Commission regulates the issue of accuracy of reporting and the existence of this mechanism would also, to some extent, also mitigate any potential prejudice arising from mis-reporting.
56. As previously indicated, the Commissioner is not able to discuss the content of the slide in any detail in light of the public authority's contention that to do so might result in a breach of a duty of confidence owed to the company. Having reviewed the withheld information and received arguments from the public authority, the Commissioner is of the view that the information on the slide is not information which should necessarily raise any public concerns or that would indicate that the company's products differed from others sold commercially. He

is not satisfied that disclosure would have caused a real and significant risk to the company's commercial interests, particularly if the information had been released with an accompanying statement placing it in context. The Commissioner does not therefore believe that section 43(2) was engaged.

57. Although the Commissioner is not of the view that section 43(2) was applicable to the requested information, he considered it prudent to examine whether the public interest in maintaining the exemption would have outweighed the public interest in disclosure, if the exemption had been engaged.

Public interest in favour of withholding the information

58. The Commissioner acknowledges that there is obviously a public interest in ensuring that a company does not suffer commercial harm as a result of the disclosure of particular information. In this case it was argued that this could arise as a result of the misrepresentation or misunderstanding of the information. Even if the Commissioner were incorrect in his assessment that it was not likely that prejudice would have occurred, he is not convinced that any harm which might have arisen would have been extensive or severe. This is particularly the case in light of the option to release the information with an accompanying explanatory statement setting it in context.
59. The public authority also argued that there was already a significant amount of information in the public domain that related to the cooking conditions required to ensure the safety of burgers and, consequently, there was little public interest in disclosing the withheld information. The Commissioner acknowledges that there was information readily available to the public on this subject. However, he notes that the focus of the request was on the evidence submitted to the ACMSF working group by the company which had originally sought to have the existing guidance reviewed. There is clearly a significant public interest in the public being able to see evidence presented to a public body considering whether there should be changes to guidance on a matter related to food safety.

Public interest in favour of disclosing the information

60. The Commissioner recognises the general public interest in furthering the understanding of, and participation in, public debates on issues of the day. This is clearly relevant in relation to an area such as food safety where there have been widespread public concerns in the past. The release of the withheld information would have allowed a much wider group of interested parties to consider the relevant data, identify any concerns that it raised and challenge any potential inaccuracies.
61. The disclosure of the information would have allowed the public to contribute more effectively to the ongoing debate about the subject. This is of particular importance at a point where there is an opportunity for the public to influence the debate prior to any decision being taken. In this case, the issue of possible changes to existing guidance was still under consideration at the time of the request and therefore it was important that those parties who had an interest in

contributing to the debate were able, as far as possible, to see all the evidence considered by the ACMSF working group.

62. Whilst at the time of the request the ACMSF's draft report had not been published for public consultation, the public authority would have been aware that this would occur shortly afterwards. Disclosure would have allowed those people who were likely to respond to the public consultation to review the information, with the help, if necessary, of scientific advisors, before providing their views. This could have resulted in a more informed debate in relation to some of the issues under consideration.
63. There is a significant public interest in transparency in decision making by public authorities. In this case, there is clearly an argument that the company that provided the withheld information had greater access to the policy making process than other interested parties in light of the fact that the review of the guidelines was initiated following its suggestion that they should be re-examined. There is therefore a public interest in there being scrutiny of that process and the information the company was able to put before the ACMSF committee to ensure that its relationship with that committee was not unduly influential.
64. It is apparent that the company was engaged in lobbying the public authority and the ACMSF committee with a view to the existing guidance in this area being changed in a way that made it more compatible with its own perceptions as to the appropriate cooking regime for burgers. Disclosure could also therefore have contributed to the public understanding of the degree to which the company's input may have shaped policy in this area.
65. Having considered the relevant public interest arguments, the Commissioner is of the view that, even if the exemption had been engaged, the public interest in maintaining the exemption would not have outweighed the public interest in disclosure in relation to the withheld information. He is influenced by the need for the public to be able to properly scrutinise and comment on evidence submitted to a public body reviewing food safety guidance, particularly where the evidence is presented by an organisation which appears to have had some influence in the initial setting up of the review.
66. After determining that section 43(2) was not applicable to the withheld information, the Commissioner proceeded to consider whether the information was exempt from disclosure under section 41.

Section 41 – Information provided in confidence

67. Section 41(1) provides that information is exemption from disclosure if:-

- (a) it was obtained by the public authority from another person and
- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

68. In order to determine whether section 41(1) applied to the information that had been withheld, the Commissioner took into account the guidance on the application of the section provided by the Information Tribunal in *Derry City Council v The Information Commissioner (EA/2006/0014)* at paragraph 30. The issues he considered were:-

(a) was the information obtained by the public authority from a third party?; and if so

(b) would the disclosure of any of the information constitute an actionable breach of confidence, that is

i. did the information have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so

ii. was the information imparted in circumstances creating an obligation of confidence?; and, if so

iii. would disclosure have been an unauthorised use of the information and, in the case of commercial information, would it have had a detrimental impact on the commercial interests of the confider?;

and, if this part of the test was satisfied;

(c) would the public authority nevertheless have had a defence to a claim for breach of confidence based on the public interest in disclosure of any of the information?

(a) Was the information obtained by the public authority from another person?

69. The slide from the presentation was clearly provided by the company to the public authority. The Commissioner is therefore satisfied that this was information obtained by the public authority from a third party for the purposes of section 41. He has gone on to consider whether this information was subject to a duty of confidence owed to the company.

(b) Would the disclosure of the information constitute an actionable breach of confidence?

(i) Does the information have the necessary quality of confidence to justify the imposition of an obligation of confidence?

70. The Commissioner believes, after reviewing the content of the slide, that it does not contain information that would be regarded as trivial or information that is otherwise accessible. He is therefore satisfied that it has the necessary quality of confidence to justify the imposition of an obligation of confidence.

(ii) Was the information communicated in circumstances that created such an obligation?

71. The initial slide for the presentation, of which the slide under consideration formed a part, stated that the document concerned was confidential and was not to be disseminated, distributed or copied without the prior permission of the company. In addition, the Commissioner understands from the public authority that the ACMSF secretariat wrote to the company prior to the presentation to explain that its meetings took place in private session so that it could consider papers which contained information of a speculative nature, unpublished data or commercially sensitive information. Assurances were also given by the ACMSF that it would not include any information provided by the company in its report without the company's permission. In these circumstances the Commissioner is satisfied that an obligation of confidence was created in relation to the company's slide.

(iii) Would disclosure of the information have been unauthorised and have had a detrimental impact on the commercial interests of the US fast food company?

72. The Commissioner was provided with copies of correspondence between the public authority and the company concerning the possible disclosure of the information on the slide. He is satisfied that the company would not have consented to disclosure of the information at the time that the request was made.

73. The public authority raised the same arguments for detriment to the company's commercial interests under section 41 as for likely prejudice to its commercial interests under section 43(2). The Commissioner is not satisfied that disclosure would have had a detrimental impact on the company for the same reasons that he did not believe that disclosure would have been likely to prejudice its commercial interests in relation to section 43(2). This is particularly in light of the fact that a release of the information could have been accompanied by an explanatory statement setting it in context and that there does not appear to be anything unusual about the information which would raise public health concerns or that would indicate that the company's products differed from others sold commercially.

74. Although the Commissioner was not convinced that a detriment to the duty of confidence existed in relation to the withheld information, he considered it prudent to examine, if there had been a duty of confidence, whether the public authority would have had a defence to a claim for breach of any such duty based on the public interest in disclosure of the information concerned.

c) Would the public authority have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

75. Section 41 is an absolute exemption and therefore there is no public interest test to be applied under the Act. However, under the common law, a duty of confidentiality can be overridden if there is an overriding public interest in the disclosure of the information concerned.

76. Under the Act, the public interest test assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. Under the law of confidence, the public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The public interest test in relation to the duty of confidence is therefore the reverse of that under the Act. Disclosure would, therefore, be lawful where the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

Public interest arguments in favour of maintaining the duty of confidence owed to the company

77. The Commissioner recognises that where a duty of confidence has been created there is a strong inherent public interest in the maintenance of that duty.

78. The Commissioner also acknowledges that there is an important public interest in ensuring that a company does not suffer detriment as a result of the disclosure of particular information. As with section 43(2), even if the Commissioner were incorrect in his assessment that it was not likely that detriment would have occurred, he is not convinced that any detriment which might have arisen would have been significant. This is particularly in light of the option to release the information with an accompanying explanatory statement setting it in context.

79. The public authority also argued that the public interest in knowing of the risks in this area had already been met to some extent by the information related to food safety made available by the public authority and, particularly, the information related to the proper cooking of burgers.

80. Whilst the Commissioner is aware that a significant amount of information has been placed in the public domain by the public authority related to the safe cooking of burgers, he notes that this request was directed at ascertaining what evidence the ACMSF working group had considered in reaching the conclusions contained in its draft report. There is clearly a strong public interest in the public being able to see the evidence on which public bodies reach their conclusions on matters such as food safety.

81. The public authority was of the view that the ACMSF working group considered a range of evidence from different sources, of which the information provided by the company formed only a small part. It believed that it would consequently be unfair to focus specific attention on the one company by releasing information relating to it, when the issue being considered was a generic one relevant to the whole industry. However, the Commissioner notes that it was the company which sought to instigate the review of the existing guidelines and therefore it is probably to be expected that it might be subject to greater scrutiny than others that were involved as a result of its leading role.

82. The public authority also argued that if food companies believed that information related to discussions they had with, and information that they provided to, the public authority would be released they might be less likely to have such open dialogue. This would lead to a loss of trust which could result in reluctance on the

part of industry to provide it with all the information it needed to carry out its statutory functions and to a loss of candour in its relationship with industry. This could be damaging to the public authority's objective regarding the protection of public health and consumer interests in relation to food.

83. The Commissioner notes the point being made but emphasises that his decision is based on the specific facts of this case. He is not seeking to create a precedent for all future situations where a request is made for information provided to the public authority by food companies. In each case, the public authority would need to consider the individual factors relevant to that situation and make a determination as to whether it was appropriate to apply a specific exemption. He does not therefore feel that, if he were to order disclosure in this case, it would lead to a reduction in the willingness of food companies to provide it with information and enter into an open dialogue in future.

Public interest arguments in favour of the disclosure of the information

84. The Commissioner took into account the same public interest arguments as to whether there would have been a defence to a claim for breach of confidence as he considered in relation to the arguments in favour of disclosure when determining the applicability of section 43(2).

85. After considering the public interest arguments, the Commissioner has formed the view that, in this case, the public interest in disclosure outweighed the public interest in maintaining the duty of confidence owed to the company. He is influenced by the need for the public to be able to properly scrutinise and comment on evidence submitted to a public body reviewing food safety guidance, particularly where the evidence is presented by an organisation which appears to have had some influence in the initial setting up of the review.

86. The Commissioner is therefore not satisfied that section 41 applied to information contained on the withheld slide.

The Decision

87. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:

- it incorrectly applied sections 41 and 43(2) to the withheld slide;
- it breached section 1(1)(b) by not providing the complainant with the withheld slide;
- it breached section 10(1) by not providing the complainant with the withheld slide within 20 working days of the request;
- it breached section 17(1)(b) and (c) by not stating in its refusal notice that it was relying on sections 41 and 43(2) nor explaining why they applied;

Steps Required

88. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose to the complainant the slide from the company's presentation that was withheld under sections 41 and 43(2).

89. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

90. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

91. The public authority withheld a report in full under sections 41 and 43(2) which had been provided to it by the company. This is despite the company having informed the public authority, at a point prior to the request being made, that many of the issues raised in the report were in the public domain. It was only disclosed to the complainant after the Commissioner pointed this out to the public authority. This would suggest that the public authority should not have withheld all or most of the report when the request was made.

92. Another report provided by the company was withheld under sections 41 and 43(2) until the Commissioner informed the public authority that its main findings were contained in the draft report prepared by the ACMSF committee. This draft report had been available on the public authority's website from a point shortly after the request was made. The public authority then withdrew its arguments that the report was exempt from disclosure. Whilst the Commissioner has made no judgement as to whether the public authority was entitled to withhold the report at the time of the request, it would have been appropriate for it to have reviewed its decision in light of the information it should have been aware had been placed in the public domain.

93. The above issues suggest that the public authority should have taken more care in the initial application of exemptions, and in its continued reliance on those exemptions, in light of the information it should have been aware was in the public domain.

94. The Commissioner also notes that the public authority relied on section 22 to withhold two research papers which were subsequently disclosed to the complainant. However, publication did not occur until over two years later. He is concerned that the public authority should make sure that before applying the exemption in future that it ascertains that there is a definite intention to publish the relevant information within a realistic and reasonably short timeframe from the point at which the request has been made.

Failure to comply

95. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

96. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

97. 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.
98. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 27th day of July 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”