

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2013

Public Authority: Department for Environment, Food & Rural Affairs (DEFRA)

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested from the Animal Health and Veterinary Laboratories Agency of DEFRA (AHVLA) a list of UK operators holding a UK animal transporter authorisation along with their relevant authorisation numbers. AHVLA refused the request relying on section 40(2) of FOIA (personal information) and section 41(1) (information provided in confidence). During the course of the Commissioner's investigation, AHVLA additionally relied upon the health and safety (section 38(1) FOIA) exemption.
2. The Commissioner's decision is that AHVLA has correctly relied upon the section 38(1) FOIA exemption and that the balance of the public interest favours maintaining the exemption. He also found AHVLA in breach of section 17(1) FOIA in providing an inadequate refusal notice and in not including the section 38(1) FOIA exemption in its refusal notice.
3. The Commissioner requires the public authority to take no steps to ensure compliance with the legislation.

Request and response

4. The role of AHVLA is defined as being to safeguard animal health and welfare as well as public health, to protect the economy and to enhance food security through research, surveillance and inspection.

5. Under legislation intended to safeguard animal welfare, those who transport animals over distances in excess of 65 km in connection with an economic activity are required to hold a transporter authorisation. Type 1 authorisation holders are permitted to transport animals over distances of more than 65km for a period of time of up to eight hours; type 2 transporter authorisations entitle the holder to transport animals for journeys of over 65km and taking more than eight hours. Within the UK, AHVLA administer the system of transport authorisations.
6. On 24 April 2012, the complainant wrote to AHVLA requesting:

a list of the UK operators who hold a UK transporter authorisation along with their relevant authorisation numbers.
7. On 30 April 2012 AHVLA refused the request "Due to data protection" but did not rely on any FOIA exemptions.
8. On 1 August 2012, following an internal review, AHVLA said that it held the information requested but withheld it relying on the section 40(2) and section 41(1) FOIA exemptions. AHVLA acknowledged that its 30 April 2012 response had been inadequate and had not complied with section 17(1) FOIA.

Scope of the case

9. On 23 August 2012 the complainant contacted the Commissioner to complain about the way the request for information had been handled. She said that the European Council Regulation 1/ 2005 of 22 December 2004, at Article 13.4, required the requested information to be made publicly available for type 2 transporters and that, in her view, AHVLA was in breach of the Regulation. She added, with supporting evidence, that the authorities in Latvia and the Netherlands had complied with Article 13.4.
10. During his investigation, which began on 15 October 2012, the Commissioner considered the application by AHVLA of the section 40(2) and 41(1) FOIA exemptions. On 9 January 2013 AHVLA told the Commissioner that it considered that the health and safety exemption at section 38(1) FOIA applied.
11. In his investigation, the Commissioner considered all of the evidence he has received from AHVLA and the complainant. He has had regard for the European Council Regulation 1/ 2005, noting Article 13.4 in particular. He has also noted the information that is made available to the public by some transporters and has seen evidence of

threatening, abusive and sometimes violent activities by some animal rights activists.

12. The Commissioner first considered the application of the section 38(1) exemption to the withheld information.

Reasons for decision

13. Section 38(1) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or*
- (b) endanger the safety of any individual."*

The prejudice test

14. To determine whether the application of section 38(1) to the requested information was correct under the terms of the FOIA, the Commissioner has considered the 'prejudice test', in this case whether disclosure of the information would cause endangerment to the health and safety of one or more individuals. If the exemption is engaged, he will then go on to consider whether the public interest lies in disclosing or withholding the information.
15. In *Hogan v the Information Commissioner and Oxford City Council (EA/2005/0026 and 0030)* the Tribunal stated that:

"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption ... Second, the nature of 'prejudice' being claimed must be considered...A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

The applicable interests within the relevant exemption

16. As section 38(1) provides that information relating to the endangerment of health and safety of an individual can be withheld, the prejudice involved in disclosure of the information requested must therefore relate specifically to the health and safety of one or more individuals.
17. The Commissioner considers it would be artificial to draw a distinction between a threat to (a) physical and mental health and (b) safety in

this context. Further, the Commissioner accepts that where individuals are under threat of attacks on their physical health, this is likely to affect their mental health. Therefore, where the Commissioner considers the exemption to be engaged, he considers both limbs of the section 38(1) exemption to apply.

18. In relation to this approach, in *PETA v the Information Commissioner and the University of Oxford EA/2009/0076*, the Tribunal stated that:

"it was suggested by PETA [People for the Ethical Treatment of Animals] that for the Tribunal to be satisfied that there was a danger to mental health that positive evidence from e.g. a psychiatrist as to the clinical impact of the campaign upon the mental health of those affected would be necessary. The Tribunal rejected this contention and was satisfied that the level and nature of the physical threat was sufficient that on a balance of probabilities the effect upon the mental health of those involved would go beyond stress or worry and constitute an endangerment to their mental health."

19. AHVLA told the Commissioner that it relied upon the endangerment to the health and safety of individuals as its grounds for withholding the requested information. It was concerned for the health and safety of the transporters and their staff; it also expressed related concerns for the safety of its own staff.

The nature of prejudice

20. The Tribunal, in the case of *Hogan*, commented that *"...an evidential burden rests with the decision-maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice..."* (paragraph 30).
21. In evidence to the Commissioner AHVLA said that some 'animal rights activists' ("activists") had previously used threatening and abusive behaviour against transporters with a view to stopping the transport of live animals. AHVLA said that providing members of the public with transporter details would make it easier for such activists to target transporters. There had, AHVLA said, been incidents which had resulted in legitimate transporters being forced to stop the transport of live animals.
22. AHVLA gave as an example cross-channel ferry operators and said that only one small ferry operator was now willing to carry vehicles containing live animals. It said that all of the other major ferry operators had succumbed to pressure brought to bear on them by activists. During his investigation the Commissioner has seen that at

least one major ferry operator states that it will only carry vehicles containing animals being transported specifically for breeding purposes.

23. In evidence to the Commissioner AHVLA outlined relevant incidents in relation to the transport of animals in support of its position, some of which had at times been threatening, abusive and violent, and had required police intervention. Some of these incidents post-dated the issue of its 30 April 2012 refusal notice but predated AHVLA's 1 August 2012 internal review. AHVLA also offered supporting evidence regarding later incidents that post-dated the internal review and said that in its experience the dangers to those working in the animal transport industry were, if anything, increasing rather than diminishing with the passage of time.
24. The Commissioner recalled that, in a previous matter (his reference FS50246399), he had seen evidence of targeted activities designed to harm the health and safety of individuals linked to companies which supply animals to organisations involved in research experiments on animals. He had accepted then that individuals associated with those organisations would be likely to be similarly targeted by activists which could put the health and safety of those individuals at risk; he recognised that the risk extended to some animal transporters.
25. The complainant said that it was perfectly possible to obtain comprehensive details of livestock hauliers within the UK by accessing relevant websites. She said that the claim that publishing a list of livestock carriers would endanger their health and safety was spurious, adding that if livestock carriers felt endangered they would not publish their details and would only drive unmarked trucks not displaying their business details.
26. The Commissioner has examined the withheld list of type 2 transport operators provided to him in confidence by AHVLA. He has seen that some, but not all, of the operators listed there openly advertise their services to members of the public; he has also seen that other type 2 listed transporters do not appear to advertise their services to the general public. Taking account of evidence from AHVLA and the complainant, supplemented by his own researches, the Commissioner is satisfied that there is a causal link between disclosure of the names of at least some of the listed transporters and the risk claimed to the health and safety of individuals associated with them.

The likelihood of prejudice

27. When considering the application of the exemptions and the public interest test, the Commissioner must assess the circumstances that

were relevant at the time of the request or at the latest by the date of compliance with sections 10 and 17 of the Act. This is in line with the decision of the Tribunal in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/0072)* (paragraph 110).

28. The Commissioner's duty in this case is to consider whether disclosure of the requested information would be likely to pose a risk to the health and safety of individuals associated with the transport of animals. AHVLA provided the Commissioner with evidence which demonstrated the continuing nature of the dangers posed by some activists. The Tribunal, in the case of *John Connor Press Associates Limited v Information Commissioner (EA/2005/0005)*, stated that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*" (paragraph 15). The Commissioner has interpreted this to mean that, in order for a public authority to satisfy him that disclosure of the requested information would be likely to endanger the health and safety of individuals, it must demonstrate that the risk of prejudice need not be more likely than not, but it must be substantially more than remote.
29. The Commissioner considers that the previous examples of activists targeting individuals linked to organisations which provide animals and organisations which conduct research demonstrates that there is a continuing threat of threatening, abusive and violent activity posed by some activists. The Commissioner accepted AHVLA's evidence that there is a strong likelihood that, if the names of the transporters were disclosed, then at least some of them would be likely to be targeted by some activists.

Public interest test

30. Having considered the arguments provided by AHVLA the Commissioner is satisfied that disclosure of the information would be likely to endanger the health and safety of at least some individuals and that therefore section 38 is engaged. As section 38 is a qualified exemption, the Commissioner has gone on to consider whether the balance of the public interest favours disclosure of the information or the maintenance of the exemption.

Arguments in favour of disclosure

31. The FOIA legislation carries a general intrinsic principle of transparency and openness concerning public bodies and provides the general public with the right to request access to information held by public authorities.

32. As well as giving weight to the general principle of openness, the Commissioner recognises that disclosure of the requested information would increase transparency regarding the licensing of animal transporters and provide a means for potential customers to identify licensed transporters.
33. The Commissioner recognises that there is a public interest in disclosure of information which will enable the public to enter into well-informed debate on the welfare and transport of animals and of the individuals who care for them during transportation. However, the Commissioner did not consider that disclosing the names of licensed transport operators would significantly further public debate on the health and safety of individuals. Moreover, the system which AHVLA regulates in the UK, and for which Regulation 1/ 2005 sets the legal framework, is itself a major safeguard for the welfare of animals.

Arguments in favour of maintaining the exemption

34. AHVLA confirmed to the Commissioner that it had previously considered disclosing the relevant database along the lines set out in Article 13.4 but had decided that it would be unsafe to do so, a conclusion the European authorities had respected. The circumstances that had informed that decision had, AHVLA said, not changed in the interim.
35. Registration with AHVLA is mandatory for all UK operators who wish to transport animals for distances in excess of 65km in connection with an economic activity. The element of compulsion makes it incumbent on AHVLA not to disclose information that would be likely to endanger its registrants.
36. Balanced against the positive nature of the disclosure of information under FOIA, is the substantial risk to the health and safety of those individuals, along with their associates, working on the transportation of animals, which has been evidenced by AHVLA. The impact has been demonstrated to be of significant severity and would be likely to occur in some cases. This is a significant factor in favour of maintaining the exemption. The Commissioner accords strong weight to protecting individuals from endangerment. Further weight is added by the numbers of individuals potentially at risk. There are almost 1,000 transport operators listed on the AHVLA type 2 database alone; some of those transport operators and their associates would be likely to be at risk from disclosure as well as the type 1 transport operators.
37. AHVLA told the Commissioner that, if approached by a member of the public wishing to confirm whether a particular transporter is

authorised to transport livestock, then AHVLA would normally provide confirmation to the enquirer.

38. The complainant drew attention to Article 13.4 of European Council Regulation 1/ 2005 and to the UK's apparent non-compliance with Article 13.4. Regulation 1/ 2005 is concerned with the protection and welfare of animals during their transportation. Article 13.4 says that:

"The competent authority shall record authorisations issued pursuant to Article 11(1) in an electronic database. The transporter's name and authorisation number shall be made publicly available during the period of validity of the authorisation. Subject to Community and/ or national rules regarding privacy protection, public access to other data in relation to transporters' authorisations shall be granted by Member States. The database shall also include decisions notified under Article 26(4)(c) and (6)."

39. The Commissioner has seen that the purpose of Regulation 1/ 2005 is to regulate the transport of animals over long distances and protect their welfare, not to prevent their transportation. AHVLA told the Commissioner, with supporting evidence, that there had been relevant correspondence in which it had shared its concerns about the potential for misuse of the type 2 database information with the European Commission. AHVLA said, and the Commissioner accepted following his inspection of the correspondence, that it had demonstrated acquiescence by the Commission in the restricted access to the AHVLA database due to the danger posed to lawful traders by activists.

Balance of the public interest test

40. The section 38(1) FOIA exemption is engaged at the lower threshold of 'would be likely to', which is a factor that may favour disclosure.
41. The Commissioner recognises that there is a general public interest in openness and accountability of organisations which transport animals, to ensure that appropriate standards of animal welfare are met. However, the section 38(1) FOIA exemption is concerned with human rather than animal endangerment and the Commissioner does not consider that disclosure of the names of organisations which transport animals would further the public interest in disclosure.
42. The Commissioner considers there is a general public interest in making available information which would add to the debate about the transport of animals. However, he considers that release of the names of organisations that transport animals would not meet this public

interest argument to any significant degree. The Commissioner has therefore given less weight to this argument.

43. The Commissioner considers that protecting the health and safety of individual members of the public, in this case some of the individuals associated with the legitimate trade in the transportation of animals, from the real, significant and still current danger of threats, abuse and violence from some activists, is a strong public interest reason for maintaining the exemption. He has therefore given significant weight to this issue.
44. The Commissioner reminded himself that in July 2004 the UK government had issued a report: "*Animal welfare – human rights: protecting people from animal rights extremists*". This report was concerned to address an illegal campaign of intimidation by animal rights extremists, aimed at those using animals in scientific research. He has noted evidence from AHVLA that, despite the passage of time, the threat posed by some activists has continued to exist and that there have been protests directed at some animal transporter operators as well as against members of the scientific community. AHVLA's evidence was that the threat from some activists was not diminishing with the passage of time.
45. The Commissioner has balanced the real and significant threat to the health and safety of individuals which disclosure of the requested information would be likely to cause, against the public interest arguments in favour of disclosure. The Commissioner does not consider that disclosing the information requested in order to inform public debate and to promote accountability and transparency would justify the risk to individuals' health and safety.
46. He has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 40(2) and 41 FOIA exemptions

47. As the Commissioner has found that section 38(1) was correctly engaged in this case in order to withhold the information within the scope of the request, and maintained by the corresponding public interest test, he has not gone on to consider AHVLA's earlier application of the section 40(2) and 41 FOIA exemptions.

Other matters

48. AHVLA itself acknowledged that its initial refusal notice of 30 April 2012, made in response to the information request, did not comply

with section 17(1) of FOIA. This was because AHVLA did not, within the time specified, say which exemptions it was applying and give reasons including its analysis of the relevant public interest.

Right of appeal

49. 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

50. 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.
51. 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

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