

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 January 2014

**Public Authority:** Department of Agriculture &  
Rural Development

**Address:** Dundonald House  
Upper Newtownards Road  
Belfast  
BT4 3SB

### **Decision (including any steps ordered)**

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The complainant has requested information from the Department of Agriculture and Rural Development (DARD) relating to the inspection of Meat Plants. DARD disclosed information in relation to parts 2 and 3 of the complainant's request, however it refused to disclose the information requested in part 1 of that request, citing section 43(2) of FOIA as a basis for non-disclosure. The Commissioner's view is that section 43(2) has been correctly applied in this case and therefore he orders no steps to be taken.

### **Request and response**

1. The complainant made the following request to DARD on 7 March 2013:-

"I am enquiring under Freedom of Information.

  1. The names of the two Meat Plants that recently had their VIA machines shut down.
  2. The dates that they were closed down.
  3. The dates of the last clear inspection prior to closure.
2. DARD provided a response to the complainant on 10 April 2013 in which it refused to disclose Part 1 of the requested information on the basis of the exemption contained in section 43(2) of FOIA. It disclosed the information requested in Parts 2 and 3 of the complainant's request.

3. The complainant requested an internal review of DARD's decision to withhold the information in Part 1 of his request on 27 April 2014. On 20 May 2013, DARD wrote to the complainant with the details of the result of the internal review it had carried out. That review upheld the original decision not to disclose Part 1 of the requested information ("the withheld information") under the specified exemption.

### **Scope of the case**

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4. The complainant contacted the Commissioner on 20 June 2013 to complain about the way his request for information had been handled.
5. The Commissioner has considered DARD's handling of the complainant's request, specifically DARD's application of the exemption under section 43(2) of FOIA to the withheld information.

### **Reasons for decision**

#### **Section 43 Commercial interests**

6. Section 43 of FOIA sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority holding the information.

#### **Applicable interests**

7. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated.
8. The withheld information at issue in this case relates to the names of 2 Meat Plants which recently had their VIA (Video Imaging Analysis) machines shut down. DARD confirmed that the section 43(2) exemption was applied because disclosure of the withheld information would be likely to have a prejudicial effect on the two Meat Plants in question. The Commissioner is satisfied that the withheld information relates to a commercial interest.

#### **Nature of the prejudice**

9. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43(2). It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.

10. Furthermore, the authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.

### **Nature of the prejudice – the Meat Plants**

11. The Commissioner considers it important that, in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party.

12. With respect to the commercial interests of the Meat Plants, DARD told the complainant in its internal review response:

“The third parties were consulted along with their NIMEA (Northern Ireland Meat Exporters Association) representatives in the course of my review, and the Department was provided with detailed argument on how disclosure would prejudice commercial interests, including the extent and probability/likelihood. Based on those representations I would be content that the exemption under section 43(2) can be engaged.”

13. Therefore, DARD clearly considers, from the arguments provided to it by the third parties in this case, that disclosure of the withheld information would or would be likely to prejudice the commercial interests of those third parties.

14. The Tribunal in *Hogan & Oxford City Council v The Information Commissioner*<sup>1</sup> said at paragraph 33:

*“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”*

15. The first limb relates to ‘would’ and the second to ‘would be likely’. ‘Would’ therefore means ‘more probable than not’; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.

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<sup>1</sup> EA/2005/0030

16. If a public authority claims that prejudice would occur they need to establish that either:-
- the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation; or
  - given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.
17. In reaching a decision on the likelihood of prejudice, therefore, the Commissioner believes that the public authority should be able to show some causal link between the potential disclosure of the withheld information and the prejudice it has argued would or would be likely to occur.
18. DARD has provided the Commissioner with the arguments against disclosure which were provided to DARD by the third parties in this case, who represent the Meat Plants in question.
19. Both of these third parties argued that disclosure of the withheld information would or would be likely to prejudice the commercial interests of the Meat Plants. The main arguments advanced by the first representative were as follows:-
- Any information which suggests that the performance of VIA technology was unsatisfactory on the site of a member factory damages the confidence of suppliers to that factory. In this particular case, disclosure of information about machine performance, and identification of the factories that had a problem several months ago, would create a negative impression of these particular factories long after the problem has been solved.
  - It is inevitable that farmer supplier confidence would be damaged, with the consequence that it would be more difficult for the factories named to secure cattle supplies. This would mean that cattle supplies would cost more money, which in turn would make the member companies less competitive than others in the industry.
  - It is inevitable that disclosure of the withheld information would cause harm. If a factory suffered from loss of confidence from suppliers for any length of time, this would render the factory so uncompetitive that

it could no longer trade. This would result in the loss of hundreds of jobs in the areas where the factories are situated.

20. The main arguments advanced by the second representative were as follows:-
- Disclosure of the withheld information would bring into question the company's reputation among retail customers who may wrongly take the view that the company are unfairly treating their suppliers.
  - Disclosure of the withheld information could suggest that the company is having difficulty in meeting demand. This could provide an unfair advantage to competitors as it could lead customers to take their business elsewhere, which would have huge financial implications for the company.
  - Any suggestion of operational difficulties could be used to the advantage of the company's competitors. In an already aggressive market, this could cause untold loss for the company as its competitors would inevitably use the withheld information in order to poach farmer suppliers, which would lead to loss of productivity, customers and jobs.
21. In short, the arguments advanced by both representatives are to the effect that the shutting down of the VIA machines indicated a malfunction which occurred at a certain point in time. This could have happened to any Meat Plant and has now been resolved. Disclosure of the names of the Meat Plants at this stage would be very likely to cause prejudice to the commercial interests of those Meat Plants by leading to a loss of confidence of farmer suppliers in those Meat Plants and also providing an unfair advantage to their competitors, both of which would be likely to ultimately lead to loss of productivity and therefore jobs.
22. The Commissioner having considered all the arguments cited above has noted that one representative considers that disclosure of the withheld information *would* prejudice the commercial interests of the Meat Plants, whilst the other considers that disclosure would be *likely* to prejudice those commercial interests. The Commissioner, having considered all of the arguments, has concluded that disclosure of the withheld information would be likely, i.e. there is a real and significant risk, than not, to prejudice the commercial interests of the Meat Plants by placing them at an unfair disadvantage to their competitors and damaging confidence placed in them by their farmer suppliers.
23. As section 43(2) of the FOIA is a qualified exemption the Commissioner has gone on to consider the public interest in relation to the application of this exemption. Specifically, he has considered whether the public

interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of maintaining the exemption**

24. It would be in the public interest to encourage companies to introduce and keep abreast of new cutting edge technology. Companies may not do this if there is the fear of being publicly exposed for trying to introduce better practices. It is not in the public interest to encourage unfair competition and cause detriment to companies by disclosing information relating to technology issues to the public, competitors, suppliers and media.
25. The information already disclosed should be sufficient to satisfy public interest. There is no benefit to be gained by disclosing the names of the Meat Plants, particularly in such a small market. The potential for damage to the reputation of the companies concerned far outweighs any public interest in disclosure, particularly as there are no health and safety or food safety issues in this case. Disclosure of the names of the Meat Plants, whilst it would further inform the public regarding this issue, would be likely to cause detriment to the Meat Plants and consequently potentially lead to job losses, which would not be in the public interest.

### **Public interest arguments in favour of disclosing the withheld information**

26. DARD accepts that there is a general public interest in publicly owned bodies being open, transparent and accountable in relation to the performance of their functions which it recognises can help to inform the public debate. However, it believes that this interest must be balanced against the public interest in the maintenance of fair competition, a level playing field and the commercial success of the companies in question.
27. The Commissioner agrees that there is a strong public interest in public authorities being open, transparent and accountable, however he has carefully considered DARD's arguments in relation to the Meat Plants and the competitive market in which they operate.

### **Balance of the public interest arguments**

28. Whilst the Commissioner accords significant weight to the public interest in public authorities being open, transparent and accountable, he also considers that companies should be allowed to compete fairly in a small aggressive market, without fear of information being

disclosed which would place them at a disadvantage to their competitors.

29. The Commissioner accepts that, whilst DARD is the public authority which holds the information, it would be the commercial interests of the Meat Plants in question which would be likely to be adversely affected by disclosure of the withheld information. He accepts that there is a strong public interest in preserving the ability of such companies to compete fairly and maintain their productivity levels, and anything which placed this competition and productivity in jeopardy would be likely to lead to job losses, which would not be in the public interest.
30. The Commissioner accepts that there is a need to keep the public informed of food and health and safety issues, and that DARD has a responsibility to do this. However, in this case, where there are no such significant issues, and the machinery in the Meat Plants in question was quickly fixed and functioning as normal, the Commissioner does not consider that the names of the Meat Plants would be of great public interest. Whilst they would add to public knowledge, the benefit from this would be greatly outweighed by the detriment which would be caused to the Meat Plants. Since DARD has disclosed the dates of the last clear inspections of the Meat Plants prior to closure, and the dates of closure themselves, the Commissioner considers that this is sufficient to inform the public.
31. Therefore, having balanced the public interest arguments in favour of disclosure of the withheld information against those in favour of maintaining the exemption, the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the withheld information.

## **Right of appeal**

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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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: <http://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 .....**

**Rachael Cragg  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
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SK9 5AF**