

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

### **Decision notice**

**Date:** 6 January 2014

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

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

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1. The complainant has requested a copy of the information provided by the Food Standards Agency (FSA) to the Home Office in response to its request for business cases for access to communications data. The FSA refused to provide the requested information under section 35(1)(a) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the FSA has correctly applied section 35(1)(a) FOIA.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 23 April 2013, the complainant wrote to the FSA and requested information in the following terms:  
  
"A copy of the information provided to the Home Office in response to its request for business cases for access to communications data."
5. The FSA responded on 22 May 2013. It stated that the information requested was exempt from disclosure under section 35(1)(a) FOIA.
6. Following an internal review the FSA wrote to the complainant on 20 June 2013. It upheld its application of section 35(1)(a) FOIA.

## Scope of the case

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7. The complainant contacted the Commissioner on 26 June 2013 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the FSA has correctly applied section 35(1)(a) FOIA to the withheld information.

## Background Information

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9. The FSA explained that communications data is the context not the content of a communication. This includes who was communicating, when, from where and with whom but not the content of that communication.
10. It explained that currently communication records of phone contacts are collected by the communications industry for their own business purposes. It said that they are retained by them under the existing Data Retention Regulations (DRR). It explained that law enforcement, the intelligence agencies and some other public authorities such as the FSA can seek access to these records if they can demonstrate that access is necessary, proportionate and is connected to a specific investigation or operation. This is currently regulated by the Regulation of Investigatory Powers Act (RIPA).
11. It said that policy is currently being formulated and developed in this area as more communications are now taking place on the internet and fewer communications by phone. For many internet-based services, the industry does not collect communications data as there is no business need to do so. Many service providers operate from abroad and so are not subject to the DRR. Communications records that are created are not being made available to investigating authorities at the required timeliness or quality. It said that this has a direct impact on their ability to investigate and prosecute crime in this country. The government is therefore looking to formulate and develop policy to address these concerns. The draft Communications Data Bill was published on 14 June 2012. It said that the government will bring forward proposals as soon as possible and this may involve legislation.

## **Reasons for decision**

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12. Section 35(1)(a) FOIA provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption and is therefore subject to the public interest test.
13. The Commissioner has first considered whether the withheld information to which this exemption has been applied relates to the formulation or development of government policy.
14. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
15. The FSA has explained that the information withheld under this exemption is a submission provided by the FSA for the purpose of allowing Home Office policy officials to assess the present and potential circumstances in which access to communications data might be necessary.
16. The FSA explained that the Home Office commissioned investigating authorities to provide submissions on this matter to ensure that its formulation of policy in this area was based on a solid understanding of the legitimate reasons why communications data might be sought and to ensure it was able to assess any potential legal or operational complications that might arise from pursuing varying policy options.
17. The FSA said that due to the substance of the withheld information and the fact that it was submitted to policy officials at the Home Office in a formative stage of the policy cycle, it engages section 35(1)(a)FOIA.
18. The Commissioner understands that the Home Office sought submissions from a number of investigating authorities to feed into its formulation and development of policy in relation to communications data. Upon viewing the withheld information the Commissioner is satisfied that it does relate to the formulation and development of government policy.

## **Public Interest Test**

19. Section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider

whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In *DfES v The Information Commissioner and the Evening Standard (EA/2006/0006)* the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case.

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

20. The FSA has acknowledged that there is a strong public interest in ensuring that decisions made within government are open and transparent.
21. The Commissioner considers that there is a public interest in the government working in an open and transparent way. There is a public interest in disclosing information which provides the public with a better understanding behind the decision making process and enables the public to contribute where possible in relation to policies which are going to have a significant affect upon them. Furthermore there is a public interest in the government being accountable for decisions made.

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

22. The FSA has explained that it believes the following public interest arguments favour maintaining the exemption:

#### **Safe Space**

23. The FSA explained that the Policy being formulated is at a very early stage and is therefore very much a live issue. It said that it is recognised that good government requires a 'safe space' in order for officials to extend full and proper consideration to the formulation and development of policy. It said this safe space allows for a considered assessment of the respective merits or de-merits of specific courses of action, which is vital to the foundation and delivery of effective policy. It said that the value of the safe space resides in the freedom it affords officials and Ministers to partake in dialogue without the risk of premature partisan criticism that might misrepresent or otherwise inhibit discussion and debate.
24. The FSA explained that the withheld information details how communications data is presently utilised by the FSA, and how it might be utilised in the future should revised legislation confer such a right of access. It said that it serves to provide officials with a basis on which to take forward policy formulation. It said that by understanding anticipated need, policy officials are better able to address the

competing requirements to ensure that the policy delivered is effective, yet proportionate to the risk faced, and does not unjustifiably infringe on the life of the citizen. It argued that this is a challenging task, and given the inherent sensitivity around the issue, not a discussion that is best facilitated in the public forum.

25. The FSA explained that as with any area of live policy, what is considered at one point may be revised, set aside or rediscovered at a later point. It said that in this respect, the withheld information has enduring relevance to the policy formulation and development cycle.
26. It argued that without this safe space the policy formulation and development process would be significantly more difficult. It said that if the withheld information were disclosed at this point the Government would need to provide justification for its formative discussions before it had reached the point of agreeing a finalised policy position.
27. Finally it said Home Office officials have consulted widely around communications data policy and will continue to do so where appropriate. It therefore concluded that whilst the FSA considers a safe space is required in terms of disclosure of the withheld information, this does not mean the policy is being developed without any external input.

### **The Chilling Effect**

28. The FSA explained that the public is aware in a general sense that some public authorities make use of communications data for investigative purposes, and this is an issue repeatedly reported in the media. It explained that the withheld information goes beyond a general explanation, it provides detailed accounts of current activity and sets out the drivers behind potential future activity.
29. It said that given the sensitivity and legal technicalities inherent to the subject matter, it is important that policy officials feel able to seek the views of the FSA and other investigative authorities to better inform the policy formulation process. It said it is important the FSA feels able to clearly and unambiguously set out its position to the Home Office. This ensures that the advice which policy officials ultimately put to Ministers is as comprehensive and cogent as possible.
30. It confirmed that if the withheld information were disclosed, it is likely the FSA would be less frank and candid when providing input in the future. It said that whilst it would not be prohibited from generally conveying its position, it would be less likely to present certain information about operational matters in such detail. Whilst disclosure would not prohibit communication and input it would impair the quality and directness of such.

### **The Timing of the Request**

31. The FSA confirmed that proposals relating to this policy issue are in the process of being formulated and developed and will be brought forward by the Home Office at the earliest opportunity.

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

32. The Commissioner considers there is a public interest in the government operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible.
33. The Commissioner considers that good policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure. Furthermore evidence based policy is considered to be more robust and experts or industry stakeholders may be reluctant to offer their opinions if there cannot be the assurance of non-disclosure. Finally government policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely.
34. The Commissioner also considers that there is a strong public interest in the FSA being able to provide input openly and candidly. There is a strong public interest in not disclosing information which may make public authorities reluctant to provide input to this policy area both now and in the future.
35. In this case the policy is still live and still being formulated which gives greater weight to the public interest arguments in favour of maintaining the exemption. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 35(1)(a) FOIA was therefore correctly applied in this case.

## Right of appeal

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36. 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: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**