

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2020

Public Authority: Animal and Plant Health Agency
Address: Woodham Lane
Addlestone
Surrey
KT15 3NB

Decision (including any steps ordered)

1. The complainant has requested inspection reports in respect of a kennels belonging to a hunt. The Animal and Plant Health Agency (APHA) withheld the information under section 40(2) of the FOIA – third party personal data. During the Commissioner’s investigation APHA also applied section 31 – law enforcement, to the information.
2. The Commissioner’s decision is that APHA is entitled to withhold the reports under section 40(2). As this provides grounds for withholding the entirety of the information the Commissioner has not gone on to consider the application of section 31.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 4 July 2019 the complainant made a request via the Whatdotheyknow website under the heading “Inspection of premises of South Herefordshire Hunt premises in Wormelow Herefordshire in May 2016” and requested information of the following description:

“1. Will you please provide the inspection report for the above premises in May 2016. I would point out that the human and animal health aspects of your regime are matters of public interest and that in a variety of areas of public inspection transparency is the norm now. It

is also possible to protect personal data where that is actually necessary.”

5. On 30 July 2019 the APHA responded. It confirmed the information was held, but refused to provide it under section 40(2) – third party personal data, of the FOIA.
6. The complainant requested an internal review on the same day, 30 July 2019. The APHA sent him the outcome of the internal review on 8 August 2019. APHA upheld its original position.
7. During the course of the Commissioner’s investigation APHA also applied section 31(1)(g) – law enforcement, to the inspection reports. This was on the basis that disclosing the information would prejudice functions in respect of (a) ascertaining whether any person has failed to comply with the law, (b) ascertaining whether any person is responsible for any conduct which is improper and (c) ascertaining whether circumstances exist which would justify regulatory action.

Scope of the case

8. The complainant contacted the Commissioner on 8 August 2019 to complain about the way his request for information had been handled. The complainant argued that there was a general public interest in having access to reports of this nature and that there was a particular public interest in disclosing these reports given that two employees of the hunt were later convicted of animal cruelty for offence which it is believed occurred on the same day as the inspections. The Commissioner understands that the offences related to four fox cubs which were killed by hounds at the kennels. The bodies of those cubs were then left in bins at the kennels. The Complainant argues that this heightens the public interest in having access to the inspection reports in order to understand whether the bins in question were examined as part of that inspection and more generally to understand how rigorous the inspection regime was. He also argued that given the publicity that had already surrounded the conviction of the two individuals, it was hard to argue that there were any privacy issues effecting the disclosure.
9. The Commissioner considers that the matter to be decided is whether APHA is entitled to withhold the inspection reports under either section 40 or 31. Before doing so however the Commissioner has briefly considered whether the inspection reports constitute environmental information in which case the request should have been considered under the Environmental Information Regulations (EIR).

Reasons for decision

Are the inspection reports environmental information?

10. As part of her investigation the Commissioner has considered whether the inspection reports constitute environmental information as defined by regulation 2(1)(f) of the EIR. So far as is relevant regulation 2(1) provides that environmental information is information on:
- (a) the state of the elements of the environment, such as air, atmosphere, water, soil, land, ...;
 - (b) factors, such as substances, energy, noise, radiation or waste ..., affecting or likely to effect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans affecting or likely to affect the factors referred to in (a) or (b).
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- (f) the state of human health and safety, including the contamination of the food chain, where relevant, inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements by any of the matters referred to in (b) or (c).
11. The reports relate to inspections carried out under the Animal By-Product Regulations. As the Commissioner understands it, these regulations are designed to ensure that animal by products which are not fit for human consumption are disposed of safely and hygienically and do not enter the human food chain. However although the regulations may form part of a regime designed to prevent the human food chain being contaminated, the actual information within the inspection reports is not about an incident which resulted in the food chain being contaminated. Instead the information looks at whether relevant steps are being taken to prevent such an incident occurring. More importantly the risk of contamination to the human food chain is not caused by the elements of the environment, or factors or measures affecting those elements in anything but the loosest sense. Any risk would arise through the actions of those processing of the animal by products.
12. Therefore the Commissioner is satisfied that the request is not for environmental information and should be considered under the FOIA.

Section 40(2) – third party personal data

13. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
14. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

17. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
20. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. Two employees of the hunt are named in the reports as being the representatives of the plant, i.e. the kennels on which the animal by products were processed. APHA has explained that under Article 3(11) of Regulation 1069/2009 ("Animal By-Product Regulations") an 'operator' means the natural or legal persons having an animal by-

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

product or derived product under their actual control, including carriers, traders and users. Operators are required to ensure the plant is compliant with the requirements in the Animal By-Product Regulations. Therefore, APHA believe the information contained in the inspection reports is the personal data of the two employees to the extent that it relates to their actions/inactions in controlling the plant.

22. Having viewed the reports the Commissioner accepts that they set out how well the plant is performing against the standards required by the Animal By Product Regulations. Given the circumstances of the case, and the fact the report relates to activities of the two named employees and how well they were managing the kennels in respect of the Regulations, the Commissioner is satisfied that the information relates to the named employees. She is satisfied that this information both relates to and identifies them. Furthermore given the publicity surrounding the prosecution for animal cruelty relating to activities at the kennels the Commissioner does not consider it would be practical to anonymise the reports. The Commissioner therefore finds the information falls within the definition of 'personal data' in section 3(2) of the DPA.
23. For completeness the inspection report also contains the personal data of the APHA official who carried out the inspections. The Commissioner is satisfied that the name of the officer constitutes their personal data for the purposes of section 3(2) of the DPA even if the focus of the rest of the inspection report is on the activities of the two named employees of the hunt.
24. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

27. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

29. In addition to these requirements there are stricter conditions placed on the processing of criminal offence data, which would have to be satisfied before its disclosure would be lawful and compliant with principle (a).
30. Under section 11(2) of the DPA criminal offence data is that which relates to criminal convictions and offences including personal data relating to:
- (a) The alleged commission of offences by the data subject; or*
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
31. However having viewed the information and having considered APHA's explanation of the purpose of the inspections, the Commissioner is fully satisfied that the information does not contain any criminal offence. Therefore the disclosure of the personal data of the two hunt employees and APHA official is only required to satisfy one of the lawful bases for processing in Article 6(1).

Lawful processing: Article 6(1)(f) of the GDPR

32. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
- "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".*
33. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

35. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. The complainant wishes to access the reports in order to better understand how APHA carries out its functions. APHA itself recognises that there is a public interest in the disclosure of reports in order to increase transparency and aid well informed debate concerning its work.
37. The complainant also appears to argue that the inspections concern or relate to the welfare of the hounds and that as the hounds are taken out into the open countryside as well as to country shows, where they can interact with a wide range of people and other animals, there is an interest in ensuring the inspections that relate to the welfare and health of the animals are carried out properly.
38. The complainant also suggests that as a proven act of animal cruelty occurred at the premises on the same day as the inspections, there is an increased interest in accessing the reports. The Commissioner understands the complainant's point to be that if hunt employees working at kennels at the time of the inspections, were convicted of animal cruelty offences, those same employees were likely to neglect the welfare of other animals, including the hounds, and that if the inspection was rigorous, one would expect this to be reflected in the reports.
39. In light of the above the Commissioner is satisfied that the complainant is pursuing a legitimate interest in requesting the information.

Is disclosure necessary?

40. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

41. In broad terms the legitimate interests being pursued by the request are twofold. Firstly there is the general interest in increasing transparency of the work of APHA and its inspection regimes. Secondly there is the interest in ensuring those inspection regimes effectively safeguard the welfare of the animals under the control of the hunt. In respect of the second point, APHA has explained that the inspections it was conducted under the Animal By Product Regulations were not in anyway concerned with the welfare of animals. They were solely concerned with how the kennels stored the carcasses of dead livestock and processed those carcasses before they were fed to the hounds and how any remains were disposed off. The inspections would have focused just on those parts of the premises where those activities were carried out; it would not have been the intention to inspect the whole site or consider any animal welfare issues relating to other aspects of the kennels' operation. Having said that, APHA has commented that had its officer observed anything untoward during an inspection they would have notified the relevant authorities.
42. Given that the reports do not examine animal health and welfare issues in the way the complainant expects them to, their disclosure would not serve those interests. However the disclosure of the reports would still serve the more general interest in increasing transparency and understanding of how APHA carries out its functions. To achieve that greater transparency however the Commissioner does consider it would be necessary to disclose the name of the APHA officer who conducted the inspections, as those details would add very little to one's understanding of the work that APHA was doing. As disclosure of the officer's name is not necessary, there is no lawful basis for this processing and it is unlawful. APHA are therefore entitled to withhold the name of that officer under section 40 of the FOIA.
43. Although the name of the officer could be redacted, the Commissioner does not consider the reports could be anonymised in respect of the hunt employees named as the plant representatives. This is because the media coverage of the prosecutions for animal cruelty revealed sufficient details from which one could easily identify who the plant representatives would be. This is particularly true as the incident in question was relatively recent. Reports in national newspapers of the conviction of those involved in the animal cruelty case date from June 2019. In light of this the Commissioner finds that it would be necessary to disclose the personal data of the plant representatives in order to fully meet the interests being pursued.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

44. It is now necessary to balance the legitimate interests in disclosing the personal data of the hunt employees named as plant representatives

against their interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

45. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the data subjects expressed concern to the disclosure; and
- the reasonable expectations of the data subject.

46. In the Commissioner's view, a key issue is whether the hunt employees concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

48. APHA has advised the Commissioner that reports are intended for the owners or occupiers of the premises being inspected. The reports summarise the outcome of the inspection and identify any actions that they need to take in order to comply with the Animal By Product Regulations. APHA therefore argues that the hunt employees would have no expectation that the reports would be disclosed to third parties or enter the public domain by being released in response to a request under the FOIA. Their expectation would be that the reports would only be used by APHA for its own regulatory activities.

49. When considering what impact disclosing the reports would have on the hunt employees the Commissioner has had regard for the fact that the information relates to their activities in a professional capacity. This means disclosing the information would be less intrusive than if the information related to their personal lives. However although the reports disclosure do not relate to the incident which resulted in the prosecution for animal cruelty, their disclosure would inevitably draw attention to the incident and connect the hunt employees to that event. The employees could become the focus of media attention as a result. Therefore, in the circumstances of this case, the Commissioner considers the disclosure

disclosing the reports would be more intrusive than would otherwise be the case.

50. The Commissioner is satisfied the information is not already in the public domain and has only be used within APHA for its regulatory purposes. It may be that copies of the reports would have been passed to the hunt as owners of the kennels, but there are no grounds for considering the hunt would have shared the information more widely. In any event the Commissioner understands that both the kennels and the hunt are no longer in operation. As a consequence APHA has been unable to contact the two employees and neither of them has had the opportunity to object to the disclosure of their personal data.
51. In light of the above the Commissioner is satisfied that disclosing the reports would have a detrimental impact on the hunt employees. This then has to weighed against the legitimate interest in releasing the reports in order to shed light on the work of the APHA. As it does not appear to the Commissioner that the reports themselves reveal anything of great significance in respect to how the inspections were conducted or the findings of those inspections, she finds the reports would have only limited value in furthering the public's understanding how APHA performs its functions.
52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
53. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

54. The Commissioner has therefore decided that APHA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).
55. As section 40(2) provides grounds for withholding the entirety of the information the Commissioner has not gone on to consider the application of section 31

Right of appeal

56. 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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. 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

Rob Mechan
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