Mr Phil Jones

By email: request-223789-6e2bf7aa@whatdotheyknow.com

09 September 2014

Dear Phil Jones

REQUEST FOR AN INTERNAL REVIEW

As the Food Standard’s Agency’s complaints co-ordinator, and further to Kevin Hargin’s letter of 14 August, I have decided that the FSA should have accepted your email of 11 August as a request for an internal review of the response to your information request that the FSA sent you on 11 August.

Your original request (of 6 August) was for information in relation to the figures for the first quarter of the FSA’s 12 month survey on campylobacter contamination of chicken in supermarkets and was specifically for:

1. From which supermarkets you tested chicken?
2. How many chickens you tested in total in the first quarter from each supermarket?
3. How many chickens from each supermarket were found to have campylobacter present?

A response was sent to you on 11 August by the FSA, which stated that your request was being handled “outside the FOI process . . . since the data you requested would not be available under the terms of the FOI [sic]”.

In your reply email of 11 August (which we received on 12 August), you asked for an internal review on the grounds that the FSA had “no legal basis to refuse my request”.

Outcome of the internal review

The response letter of 11 August provided you with some background information to the publication of the FSA’s campylobacter retail survey and explained the FSA’s Board’s decision of 23 July not to publish the data (including names of retailers) from results of the first quarter of the survey because of low sample numbers and incomplete data, which the Board concluded meant that the data would not be statistically robust.
The response letter, however, did not provide you with the information you specifically requested, which was survey data relating to each supermarket.

Your initial request for information was a valid request under the FOI Act and, as the FSA holds the information you requested but did not release it to you, the FSA was wrong to handle your information request outside the FOI Act. The email to you did not explain which exemptions under the FOI Act the FSA was relying on to withhold the information, which is a requirement under section 17 of the FOI Act. I am therefore upholding your complaint.

On behalf of the FSA, I apologise for this.

I can confirm that the FSA holds the information you requested.

However, having reviewed your request, I am in agreement with the official’s decision to withhold the information you requested. I consider that the information was exempt from disclosure under section 22 of the FOI Act - information intended for future publication - as it was the FSA’s intention at the time you submitted your request to publish information relating to individual supermarkets and retailers in the future.

Section 22 of the FOI Act states:

(1) Information is exempt information if -
(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
(b) the information was already held with a view to such publication at the time when the request for information was made, and
(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

As you are probably aware, the FSA published the interim results of the survey (without individual supermarket results) on the FSA website on 5 August and this is available at: www.food.gov.uk/news-updates/news/2014/aug/campylobacter-survey. The news story published on 5 August included a quote from the FSA’s Chief Executive that “As soon as we have enough data to robustly compare campylobacter levels in different retailers we will share that data with consumers.”

Guidance produced by the Information Commissioner’s office makes clear that when using this exemption “the date of publication does not need to be definite for the exemption to apply” (page 3), including, for example, where “publication will take place once an information gathering exercise has been completed”. As the

quote above from the FSA’s Chief Executive makes clear, there is an intention to publish the data in the future and, while the exact date was not known at the time your request was received, the FSA’s commitment is to do so once sufficient data has been collected.

To rely on this exemption, it’s also necessary to consider if “it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)”.

A process was put in place by the FSA after the Board discussion and prior to the time of your initial request, to develop a timetable for publication including how to bring forward publication of some of the comparative data that would be statistically robust. The FSA has published minutes from the FSA Board’s working group of 19 August setting out these discussions: http://www.food.gov.uk/sites/default/files/fsa140903a.pdf.

At the time your request was received, it was reasonable in these circumstances not to pre-empt the discussions taking place by disclosing the results prematurely in response to your request.

The FSA has now agreed a revised timetable of publication, which will be presented to the FSA Board on Wednesday 10 September. It has now been agreed to publish the results of the largest retailers of fresh chicken (Tesco, Sainsbury’s, Morrisons, Asda, The Co-operative, Waitrose, and Marks and Spencer) from quarter two in November 2014. From quarter three of the survey, the results will be published as national statistics. The agreed timetable is in the paper that was published on the FSA website on 5 September. http://www.food.gov.uk/sites/default/files/fsa140903a.pdf

As section 22 of the FOI Act is a qualified exemption, I have had to balance the public interest in withholding the information against the public interest in disclosure.

The public interest arguments relating to the naming of supermarkets in the publication of the quarterly results prior to completion of the survey were thoroughly aired in the FSA Board meeting held in open session on 23 July. The background was set out in the paper discussed by the Board, ‘Reduction of Campylobacter from Poultry: Publication of the Retail Survey Results’, which is available at the following link: http://multimedia.food.gov.uk/multimedia/pdfs/board/board-papers2014/fsa-140707.pdf. The full debate is also available on video at: https://registration.livegroup.co.uk/fsaboardmeetings/Downloads/Embed.aspx?dfid=8755

There is a strong public interest in openness and transparency of information in relation to food safety and the risk to public health of campylobacter in chicken. There is also a public interest in publishing information about levels of campylobacter in the chickens sold by individual retailers where publicity will help to drive and motivate action by retailers and producers to tackle campylobacter.
I consider, however, that there is (and was at the time of your request) a stronger public interest in ensuring that the results of the survey are not released prematurely. The FSA is an evidence-based organisation and it is therefore incumbent upon us to ensure that any information we publish is meaningful, robust and allows consumers to make informed choices. While the original intention of the Board was to publish the full retail survey results quarterly, it was reported to the FSA Board in July that a drawback of this approach was that no interpretation could properly be placed on the interim raw data until the full year’s sampling was complete and fully analysed. Legitimate concern had been expressed that the publication of incomplete data, consisting of the results of a single quarter’s sampling and analysis with retailers and producers identified for each sample, would facilitate misinterpretation of the interim data that would not be statistically valid nor supportive of any conclusions. It is not in the public interest if the premature release of information causes unnecessary concern among, or misleads, consumers. The FSA considers it is not in the public interest to place unfinished or incomplete information into the public domain, especially where there is a risk that it may leave a misleading or inaccurate impression and where (at the time of your request) the FSA was committed to publishing the full survey results once the survey had been completed.

For the reasons explained above we consider that the balance is in favour of withholding this information from disclosure.

I hope you find the response helpful and are re-assured by the FSA’s commitment to publishing the data in accordance with the revised timetable of publication which, as mentioned above, is to be presented to the FSA Board on Wednesday 10 September 2014.

If you have any queries about this letter, please contact me. Please remember to quote the reference number at the top of this letter in any future communications.

If you are not content with the outcome of the internal review, you may apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner’s Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF or through the website at: www.ico.gov.uk.

Yours sincerely

VERONICA MARTELL
FSA Complaints Co-ordinator