

Mr Lee Jefferson

Sent by email to : request-376019-bb9ab61d@whatdotheyknow.com

Our reference: IR 95 / FOI 1972

03 February 2017

Dear Mr Jefferson

REQUEST FOR AN INTERNAL REVIEW

Further to our email of 5 January 2017 acknowledging your request for an internal review of the Food Standards Agency's (FSA) reply to your Freedom of Information request FOI 1972, I have now completed my review of the FSA's response to you.

FOI Request 1972

Your original request, received 8 December 2016, was for the following information:

"Your department is listed in schedule 4 'RELEVANT PUBLIC AUTHORITIES AND DESIGNATED SENIOR OFFICERS ETC' of the Investigatory Powers Act 2016 (linked to here <http://freepdfhosting.com/64c5f91342.pdf> - please provide a file format you can read if you cannot read this).

Please kindly provide information held on file (if any) which explains why your department needs access to the data gathered in the Investigatory Powers Act 2016."

FSA response to FOI 1972

In its response letter to you of 23 December 2016, the FSA replied that it was withholding all information in relation to your request under s.35(1)(a)

(formulation or development of government policy) of the Freedom of Information Act (FOIA).

In the same reply the FSA did go on to provide some general information as follows;

“...., you may find it useful to refer to the operational case for the use of communications data by public authorities, which was published to support the passage of the Investigatory Powers Act:”

The FSA then went on to include the following link;

<https://www.gov.uk/government/publications/investigatory-powers-bill-overarching-documents>

Request for internal review

In your email of 23 December 2016, you requested an internal review of our decision to withhold the information relating to your request as follows;

“I am writing to request an internal review of Food Standards Agency's handling of my FOI request 'Investigatory Powers Act 2016'.

We were provided with a complete response to this request by your Regulatory and Legal Strategy Directorate one day prior to you refusing to comply with the request citing section 35(1)(a).

The reply your Regulatory and Legal Strategy Directorate provided included the following paragraph:

You may be aware that, as a response to the horsemeat incident of 2013, the FSA established the National Food Crime Unit (NFCU) to provide national leadership in tackling serious criminality in UK food supply networks. The horsemeat incident showed the concern that can be caused to consumers when there is criminality in food supply networks and the need for the FSA to take an active role in protecting public health and consumer confidence in food. To help achieve this, it may be necessary in some targeted investigations for the NFCU to have access to communications data to identify offenders and their criminal activity.

We don't feel there should be a scope for such an inconsistency between your refusal to provide the information and the information sought after being provided by your Regulatory and Legal Strategy Directorate. Who is at fault here?”

Outcome of the internal review

I have considered afresh whether we were correct to withhold the information that the FSA holds which explains why the Agency needs access to data gathered under the Investigatory Powers Act 2016.

I would like to start by dealing with the fact you received a response to a separate request which you made 03 December 2016 from the email account micsft887@gmail.com.

This was sent to the FSA's Helpline as follows;

"Subject: Investigatory Powers Act 2016

Dear Sir/Madam,

As you may or may not know you are a named authority as being able to access the website browsing history of any UK citizen. Your authority is listed in schedule 4 of 'named authorities' in the Investigatory Powers Act 2016 listed here: <http://freepdfhosting.com/64c5f91342.pdf>

I was wondering if you had any idea why this is the case.

Kind regards,

Lee Jefferson."

This email received a reply 22 December 2016 from Gareth Williams, FSA Regulatory and Legal Strategy Directorate as follows;

"Dear Mr Jefferson,

Thank you for your enquiry of 3 December concerning the listing of the Food Standards Agency (FSA) as a named authority in the Investigatory Powers Act 2016.

You may be aware that, as a response to the horsemeat incident of 2013, the FSA established the National Food Crime Unit (NFCU) to provide national leadership in tackling serious criminality in UK food supply networks. The horsemeat incident showed the concern that can be caused to consumers when there is criminality in food supply networks and the need for the FSA to take an active role in protecting public health and consumer confidence in food. To help achieve this, it may be necessary in some targeted investigations for the NFCU to have access to communications data to identify offenders and their criminal activity. I hope that this clarifies the position."

In your request for an internal review you comment that you had dealt with two separate parts of the FSA, on the same matter, but received very different responses.

My investigation found that these two separate communications were being considered at the same time, and separately. It does not appear that either responder was aware of the other's work. This is explained by the fact that one (your first email) was a general enquiry whilst the second was specifically a FOI request. Consequently they entered two separate routes of response.

Whilst ideally these two responses might have been co-ordinated by the FSA such that one reply could have acknowledged the other, I do not conclude that your two requests are in fact the same and consequently I do not agree that you were subject to inconsistent handling by the FSA.

Your first contact (3 December 2016) is seeking a response to a general question about whether we know why the FSA is listed as a 'relevant authority' within the Investigatory Powers Act 2016. Your second contact (8 December 2016) is a formal FOI request which was interpreted, correctly in my view, as a request to have access to background information which underpins this position. These are two separate matters – one is a general enquiry, the other is a formal request to access recorded information.

This leads me then to consider the application of the s.35 (1)(a) exemption.

In its response to you the FSA explains this exemption and the fact that it is qualified and thus requires the undertaking of a public interest test. The principles of 'safe place' and the potential to discourage candid dialogue between officials are accurately outlined to you.

During my review I interviewed the person who led on your response and also examined the information which they considered whilst forming their conclusions. I noted that within this they had referred to FOI consultation responses from a government department third party. The material discussed in that process led to the third party offering the view that it should be withheld under a 'formulation of government policy' exemption. This aligned to the FSA's own view.

It is my view that the information collected in response to your request does amount to a candid exchange of opinions between government officials and relates to the formulation of government policy, a term to which we can apply a broad interpretation including one that concerns the development of a statutory instrument.

I agree with the position taken by the FSA that whilst we should recognise the general public interest in openness, and also the public interest in understanding how government devises policy, we should also recognise that good government

requires a 'safe space' in order for officials to extend full and proper consideration to the formulation and development of policy.

This safe space allows for a considered assessment of the respective merits or de-merits of different courses of action, which is vital to the foundation and delivery of effective policy. Without the protection afforded by the safe space the policy development process would be markedly more difficult. Furthermore disclosure would be likely to discourage government officials from engaging in such candid and open debate in the future. It is important that officials, when discussing developing areas of government policy, can feel unconstrained in putting forward their views without inhibition.

Overall, I consider that the balance of the public interest falls in favour of non-disclosure and therefore, in conclusion, I am upholding the original decision by the FSA to withhold the information under the exemption s.35(1)(a).

If you are not content with the outcome of this 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 their website at: www.ico.gov.uk.

Yours sincerely

Sent by email

Noel Sykes
Complaints, Enquiries and Reporting Manager