

FOIA s.40 – Absolute exemption: personal data

FOIA s.30 – Qualified exemption: investigations and proceedings conducted by public authorities

FOIA s.31 – Qualified exemption: law enforcement

FOIA s.38 – Qualified exemption: health and safety

FOIA s.43(2) – Qualified exemption: **Commercial interests/trade secrets**

Roy Benford v IC & Defra

EA/2007/0009

14th November 2007

Cases:

Bowbrick v IC and Nottingham City Council [2006] UKIT EA_2005_0006

Kirkaldie v IC and Thanet District Council [2006] UKIT EA_2006_001

Archer v IC & Salisbury District Council [2007] UKIT EA_2006_0037

Michael Leo Johnson v IC & Ministry of Justice [2007] UKIT EA_2006_0085

Facts

The Appellant requested details of egg producers corresponding to the Farm ID numbers printed on eggs. The information in issue was set out in a list held by Defra (the “List”). The first column contained the Farm ID number. The second column contained the egg producers’ names, and the third column lists addresses, corresponding to the first two columns.

The IC agreed that Defra could rely on ss.38 and 40. Defra had also invoked s.43(2), but the IC did not address that exemption. On appeal, Defra also relied on ss.30 and 31.

Findings

Which exemptions could Defra rely on?

The Tribunal held that there was no merit in the Appellant’s argument that Defra could not rely on s.40 because initially, it had invoked the DPA rather than FOIA. Defra may have referred to the wrong legislation, but the Tribunal stated that it was clearly asserting that the information was exempt because it contained personal data.

The Tribunal held that ss.30 and 31 were invoked only at the appeal stage. *Bowbrick* did not oblige the Tribunal to consider any exemption, even if it is claimed for the first time before the Tribunal. The principle in that and other cases (eg, *Kirkaldie* and *Archer*), is that each case must be considered on its facts. Here, the exemption was only claimed at the appeal stage because of developments that had by then occurred in Defra’s investigations into suspected egg mislabelling. The circumstances justifying

its reliance on ss.30 and 31 only arose at the appeal stage. The Appellant was not prejudiced. In these circumstances, Defra could rely on ss.30 and 31.

Section 40

The Tribunal asked whether the information in the List “*personal data*”? They noted that what makes data “*personal*” within the meaning of the DPA and the 1995 Directive, is whether living individuals can be identified from it.

The Tribunal stated that the Farm ID number did not identify anyone. The issues arose when the Farm ID number was combined with second and/or third columns. The IC found that the information was personal data where egg producers are individuals, but not where they are businesses. The Tribunal held that this was not an entirely helpful distinction on the facts of this case. In many instances, individuals on the List cannot be distinguished from businesses. Also, some business names on the List comprise the business owner’s name.

The Tribunal considered whether the Farm ID combined with the address also constituted personal data. They noted that Defra is unable to distinguish between personal and business addresses. Many of the addresses were likely to be the personal addresses. An address of an egg producer’s residence combined with a Farm ID identifying the person at that address as an egg producer, was “*personal data*”.

The Tribunal stated that the FOIA is concerned with access to information, not to documents containing the information. In addition to the List, the source of the information used by Defra to compile the List was also considered. Could the Appellant’s request be met from that source information? The design of the forms Defra use to collect the information was unhelpful in distinguishing between the establishment address and the other addresses. They Tribunal considered whether Defra must manually go through each form? This would not be creating new information; it would simply be extracting information already held by Defra. However, such an exercise would likely exceed the s.12 cost limits. Also, in many cases, the establishment address and the owner’s address will be the same since many owners or their staff live on site.

The Tribunal held that it was unnecessary in any event, to go that far. The Appellant was principally concerned about information as to where the egg producers were located, not the full address. They observed that the List could be redacted to provide the Appellant with information which would largely satisfy his request without the risk of disclosing personal data. An address made up of [farm name], [road], [place], [county], [out bound post code (ie the first half of the post code)] and [inbound post code (ie the second half of the post code)], the farm name, the road and the inbound post code may constitute “*personal data*”, but the county and outbound post code would clearly not. Whether the place name combined with the other information was “*personal data*” may depend on whether the place is a small village where people can be easily identified by their occupation, or a large town where that would be unlikely.

They held that producing a redacted list would not amount to the creation of new information by Defra, outside the scope of its obligations under FOIA, as has been argued. Defra holds the List in computerised form and the redaction required involves a very modest amount of time and skill. Per *Johnson*, the need to do something to the information (here to redact the personal data), did not mean that it was not held.

Other exemptions

On the basis of the redacted List, many of Defra's objections under the other exemptions fell away.

S.30 was not engaged. The information in question was held for the purposes of complying with a statutory duty to maintain a register of egg producers. Although the information may be used for other purposes as well, including for an investigation, it was not held for that purpose. The Tribunal stated that even if this is wrong, on the facts, the information in the redacted List could not be said to be held for the purposes of the case currently under investigation.

With regard to s.31, on the evidence, the Tribunal observed that the possession of Farm ID numbers is not what facilitates the fraud. There is nothing in the combination of Farm ID numbers and location as would be contained in the redacted List that changes this position. In any event, Farm ID numbers can be obtained from eggs on sale throughout the country. Also, whatever prejudice such disclosure might have on the matters in s.31, it would not meet the "*would or would be likely to*" test.

S.38 was also not engaged. Any concerns about the risk from animal rights activists fell away with the redacted List.

With regard to s.43(2), at best, the evidence shows only a tenuous connection between s.43(2) and disclosure of the List. Such risk does not arise in connection with the redacted List.

Conclusion

The appeal was allowed. S.40 was engaged but if certain information was redacted from the List, the remaining information did not come within the exemption.

A substituted Decision Notice was issued requiring Defra to communicate, in respect of each Farm ID number, elements of the address as specified in the substituted Notice.