



Neutral Citation Number: [2024] UKFTT 00643 (GRC)

Case Reference: EA/2023/0098
EA/2023/0101

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: By Cloud Video Platform
Heard on: 1 March 2024
Decision given on: 23 July 2024

Before
TRIBUNAL JUDGE FOSS
TRIBUNAL MEMBER YATES
TRIBUNAL MEMBER SHAW

Between

ECOTRICITY GROUP LIMITED

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) ANIMAL AND PLANT HEALTH AGENCY

Respondents

Representation:

For the Appellant: the Appellant was represented by Eric Metcalfe, Counsel.

For the First Respondent: the First Respondent was unrepresented and did not appear.

For the Second Respondent: the Second Respondent was represented by Nicholas Ostrowski, Counsel.

Decision: The appeal is Dismissed.

REASONS

Introduction to the Appeal

1. On 18 July 2022 and 5 September 2022, the Appellant made two requests for information to the Animal and Plant Health Agency ("APHA") as follows:

18 July 2022 (the first request)

"This is a freedom of information request.

Ref: [name of a farm redacted ("the Farm")]

1) Please confirm whether the Secretary of State granted [the Farm] any derogation under Article 18(3) of Council Regulation (EC) No 1099/2009 (PATOK¹) to kill pigs on the farm in June/July 2022, as part of a depopulation operation.

2) In the event a derogation was granted please provide the following information:

- a) The provisions of PATOK and the Welfare at The Time of Killings Regulations that were subject to the derogation*
- b) Any conditions on which the derogation was granted*
- c) How the welfare of the pigs was considered under the derogation*
- d) A copy of the derogation notice"*

5 September 2022 (the second request)

"We understand a mass pig cull took place on [the Farm] in June 2022. In relation to that pig cull please could you confirm the following:

When was your department first alerted to the possible disease risk

- 2) When were tests taken to confirm whether the pigs carried a disease*
- 3) What were the results of those tests*
- 4) When were the results communicated to the farm*
- 5) Who decided on the mass pig cull and when*
- 6) What was the management plan for the cull*
- 7) Were there APHA officials and an official veterinarian present at the cull"*

2. On 4 August 2022, APHA said that it could neither confirm nor deny that it held the information within scope of the first request. In so doing, it relied on s40(5B)(a)(i) (personal data) and s43(3) (commercial interests) of the Freedom of

Information Act 2000 ("FOIA"). The Appellant sought an internal review of that decision. On 16 September 2022, APHA maintained its position by reference to s43(3) FOIA but accepted that s40(5B)(a)(i) FOIA was not engaged as the first request did not include a request for personal data.

3. On 21 September 2022, APHA said that it could neither confirm nor deny that it held the information within scope of the second request. In so doing, it relied on s43(3) FOIA. The Appellant sought an internal review of that decision. On 24 October 2022, APHA maintained its position in reliance on s 43(3) FOIA. It confirmed that the commercial interests in question were those of the Farm.
4. On 15 November 2022, the Appellant complained to the Information Commissioner ("the Commissioner") about APHA's response to both requests. APHA maintained its position during the Commissioner's investigation. Additionally, it said it was entitled neither to confirm nor deny it held the requested information in reliance on s38(2) FOIA (health and safety).
5. On 26 January 2023, the Commissioner issued two Decision Notices: Decision Notice IC-202669-D7B6 in relation to the first request, and Decision Notice IC-203536-F3J1 in relation to the second request.
6. In summary, he decided that APHA was entitled neither to confirm nor to deny it held the information requested, for the following reasons:
 - a. the exemption under s38(2) was engaged because the Farm was identified in the requests; information about the Farm was already in the public domain; pig farming was a sensitive subject matter, and confirming or denying that APHA held the information requested would be likely to cause upset to the owners of the farm to the point that this would endanger their mental health. It would also be a likely risk to employees' safety at the premises due to concerns about the activities of animal rights protesters; protecting individuals' health and safety outweighed the public interest in confirming or denying whether APHA held information about a process that may or may not have taken place; and that confirming or denying whether APHA held the requested information would be likely to endanger individuals' health and safety.

- b. the exemption under s43(3) was engaged because the harm anticipated by APHA (negative public coverage) related to the commercial interests of the corporate owner of the Farm; there was a causal link between confirmation or denial of whether the requested information was held and the commercial prejudice anticipated by APHA feared would arise i.e. because it would indicate to the wider world whether or not the Farm culled pigs as part of a depopulation operation and because it would be likely to result in negative publicity about the Farm which may also be incorrect or not based on the facts of the situation. The Farm's and the company's competitors could use this to their advantage and the Farm's and/or the company's commercial interests could be undermined.
 - c. In relation to the balance of the public interest under s43(3): (i) although there was a public interest in the welfare of farmed animals, there was a greater public interest in farms being prepared to cooperate and engage willingly with APHA, without the need for APHA to use more formal processes to ensure that farms engaged with them; (ii) there was a public interest in not undermining the competitiveness of the Farm in this case, or its corporate owner, through generating potentially negative, and perhaps incorrect, publicity; and (iii) there was a "strong" public interest in ensuring that the UK has a strong rural economy.
- 7. On 23 February 2023, the Appellant appealed against the Decision Notices to the Tribunal.
 - 8. On 27 March 2023, the Tribunal directed that the appeals be joined.
 - 9. On 30 June 2023, the Tribunal joined APHA to the appeal.
 - 10. On 8 September 2023, APHA filed and served its Response to both appeals.
 - 11. On 20 September 2023, the Appellant filed and served its Reply to APHA's Response.
 - 12. The Tribunal gives reasons for its determination of these joined appeals in this single, OPEN decision and in a separate, CLOSED decision insofar as those reasons need to be articulated by reference to material which has been held on a CLOSED basis, pursuant to Rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Background

Notice of Appeal

13. By Notice of Appeal dated 23 February 2023, the Appellant submitted, in summary, the following grounds of appeal:

- a. The fact of the cull, the identity of the Farm and that the fact the cull was connected to a disease control operation was in the public domain at the time of APHA refusing to confirm or deny whether it held the information requested, so that there was no purpose to be served by APHA refusing to confirm that it held the information requested.
- b. S38(1) FOIA was not engaged: there was an insufficient causal link between APHA confirming or denying it held the information requested and endangerment to health; stress and upset are not to be equated with endangerment to mental health; there was no indication of any risk to physical safety.
- c. As regards s43(3) FOIA: the Appellant accepted that the Farm and its corporate owner were holders of relevant commercial interests, which could include managing competition and consumer relationships, and which may be affected by negative publicity arising from the cull; however, there was no evidence of any prejudice which would, or would be likely to, be caused by APHA confirming or denying it held the information requested; moreover, s43(3) only protects legitimate commercial interests, and given that there was a strong chance that the cull involved illegal activity, such interests could not properly be characterised as legitimate.
- d. As regards the public interest test application in relation to both s38(1) and s43(3) FOIA:
 - i. the Commissioner had failed to weigh against each other: (1) the public interest in disclosing highly important information on farm and government practices, involving the mass culling of animals, potentially in breach of the law; and (2) close relations between a regulator (APHA) and those they regulate, rather than relying on its statutory powers to ensure compliance.
 - ii. the Commissioner had not explained why it was in the public interest that the Farm and its corporate owner should remain

competitive against the possibility of the Farm and/or APHA having broken the law.

- iii. when the Commissioner reasoned that it was in the public interest to ensure a strong rural economy, it was only strong if it did not rely on clandestine practices – both the public and the consumer must have knowledge and purchasing power.
- iv. given that the fact of the cull was already in the public domain, it was unclear why the processes around the cull should be protected by public interest.
- v. in the event that there were disease concerns relating to the Farm, public health was a matter of significant public interest, and Covid had underlined the risk to public health from zoonotic diseases.
- vi. to the extent that there may have been an official derogation from the usual regulatory requirements for humane killing, there was a strong public interest in scrutinising any derogation granted, particularly given the rarity of such derogations, which would itself suggest a significant threat to public health.
- vii. the information requested would ensure that any breaches in law were addressed.

The Commissioner's Response

14. On 20 June 2023, the Commissioner confirmed that he stood by his Decision Notices for the reasons set out therein and that he did not consider that the Appellant's Grounds of Appeal disturbed his decisions. He invited the joinder of and/or submissions from APHA.

APHA's Response to the Appeal

15. We summarise APHA's OPEN Response to the Notice of Appeal, dated 8 September 2023, as follows:
- a. The appeal should fail whether it proceeded by way of a re-hearing of the refusal to confirm or deny or by way of review of the Commissioner's decisions.
 - b. S38(1) FOIA was engaged because APHA provided evidence that confirming or denying it held the information requested would be likely to

cause upset to the owner of the Farm to the point that it would endanger their mental health, and would also be a likely risk to employees' safety at the Farm premises due to concerns about the activities of animal rights protesters. In weighing the public interest in disclosure of matters relating to the welfare of animals in UK farms against the prejudice to the health and safety of the management and employees at the Farm and its corporate owner, where there is a real and actual danger to a person's health and safety, it will be difficult to find in favour of disclosure, and the Commissioner was correct to decide that the public interest in confirmation or denial was not sufficiently great to justify endangerment to health and safety.

- c. S43(3) was engaged because confidential information provided by APHA (which was redacted from APHA's OPEN Response) indicated that confirming or denying whether it held the information requested would be likely to prejudice the Farm's commercial interests: it would be likely to result in negative publicity about the Farm, which may also be incorrect or not based on the facts of the situation, and which competitors could use to their advantage, undermining the Farm's and its corporate owner's commercial interests.
 - d. The Appellant's allegation of illegal activity was unsupported by any evidence; the local authority had not instigated any prosecution of the Farm, or any individuals involved in the cull; there was no basis, on this ground, to suggest that the commercial interests identified were not legitimate.
 - e. The public interest plainly favoured non-disclosure with the following matters being of particular importance: the release of information (including confirming or denying whether such information was held) could undermine APHA's relations with, and hoped-for co-operation from, farms, and consequently limit APHA's ability to safeguard animal health and welfare.
16. APHA's Response was supported by a witness statement dated 8 September 2023 from Dr Susanna Williamson, lead of the Government-funded project for pig disease scanning surveillance in England and Wales which delivers surveillance for non-statutory pig diseases and for detection of new and emerging disease threats in pigs. Dr Williamson is the veterinary lead for the Pig Expert Group at the Animal and Plant Health Agency and has been in this role since April 2014. She is a past President of the Pig Veterinary Society.

17. Dr Williamson's witness statement was presented to the Tribunal in two forms, the first being OPEN, and the second CLOSED. The exhibits to her statement were similarly presented. The Appellant has not, therefore, seen the contents of APHA's CLOSED submissions or witness evidence.

The Appellant's Reply to APHA's Response

18. The Appellant's Reply dated 20 September 2023, maintained that there was evidence to suggest illegal activity had taken place and that the Appellant was pursuing a private prosecution (which we took to mean against the Farm/its corporate owners); without the information sought by the Appellant, it could not investigate whether offences had been committed or whether APHA had acted lawfully. The Appellant also submitted that by Dr Williamson's OPEN statement, APHA had introduced a new argument relating to trade implications which was not connected to any of the exemptions relied on by APHA and, whether characterised as a new argument or a new exemption, should be disregarded.

The hearing

19. The Appellant and APHA were each represented by Counsel at the hearing. The Commissioner did not appear.
20. The Tribunal had before it three bundles: an OPEN bundle, a CLOSED bundle, a bundle of authorities agreed by the parties, and detailed skeleton arguments.
21. The Appellant called evidence from its General Counsel, Mr Rolf Stein, who made a witness statement on 21 December 2023. Counsel for APHA cross-examined Mr Stein.
22. APHA called evidence from Dr Williamson. Counsel for the Appellant cross-examined Dr Williamson in OPEN session. The Tribunal then questioned Dr Williamson about her evidence in CLOSED session.
23. The Tribunal heard extensive oral submissions from Counsel for both parties.

24. After the CLOSED session of the hearing, APHA disclosed to the Appellant in OPEN session a description of the contents of the CLOSED bundle by reading out the index to that bundle, and a gist of the CLOSED hearing as follows:

“Counsel directed the Tribunal to the rule 14 order, taking the tribunal through the relevant information and evidence contained within the CLOSED bundle. Mr Ostrowski directed the Tribunal to the unredacted version of the documents sent to the First Respondent which were provided in redacted form in the OPEN bundle.

Dr Williamson’s evidence covered:

- a) Information about the farm in question and the disease investigation which took place and why the cull occurred.*
- b) That the Temporary Control Zone relating to Foot and Mouth Disease at the farm in question was revoked on 24 June 2022.*
- c) That a small number of diseased pigs (approximately 10) were euthanised on 28 June 2022 as part of the official APHA investigation in order to obtain material required for the notifiable disease testing which could not be collected from live pigs.*
- d) That on 29 June 2022 the notifiable disease investigation found that notifiable disease was no longer suspected on the premises.*
- e) Examples were given where potential non-statutory disease threats have been detected and private vets voluntarily liaised with APHA who provided advice and additional testing at no charge enabling mitigation of risks and/or concerns to be allayed.*

The panel further questioned Dr Williamson on non-statutory diseases. Dr Williamson explained the definition and meaning of non-statutory diseases and the events at the farm in June 2022.”

25. Counsel for the Appellant expressed disquiet at the start of the hearing as to how much information had been redacted by APHA from the papers in the appeal. Having carefully reviewed all the redacted material, and taking into account APHA’s description of the contents of the CLOSED bundle and the gist of the CLOSED session of the hearing, we are satisfied that APHA’s redactions are appropriate.

Applicable Law

26. The relevant provisions of FOIA are as follows:

Section 1

General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled-*
- (a) *To be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *If that is the case, to have that information communicated to him.*

...

Section 2

Effect of the exemptions in Part II.

...

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

...

Section 38

Health and Safety

- (1) *Information is exempt information if its disclosure under this Act would, or would be likely to –*
- (a) *endanger the physical or mental health of any individual, or*
 - (b) *endanger the safety of any individual.*

- (2) *The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).*

Section 43

Commercial Interests

...

- (1) *Information is exempt information if it constitutes a trade secret.*
- (2) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*
- (3) *The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).*

Section 58

Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers-*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

27. The import of s58 FOIA is that the right of appeal to the First-tier Tribunal involves a full merits consideration of whether, on the facts and the law, the public authority's response to the Request is in accordance with Part 1 of FOIA

(Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC); [2018] AACR 29, at paragraphs [45]-[46] and [90]. The Tribunal has jurisdiction to decide, de novo on the merits, whether the Commissioner's decision is in accordance with the law.

Analysis

Section 38 FOIA

28. The Tribunal finds that s38(2) was not engaged at the time of refusing to confirm or deny whether APHA held the requested information. We were not convinced by the arguments or evidence presented by APHA that confirming or denying it held the requested information would, or would be likely to, endanger the health or safety of any person.
29. The Commissioner decided that for APHA to confirm or deny it held the information requested would be likely to cause upset to the owner of the Farm to the point that this would endanger their mental health. We were told the Farm has corporate ownership. No distinction was drawn for these purposes between the corporate entity, its directors and employees, or those who work on the Farm (to the extent that they are not the corporate entity's employees). In any event, no relevant individual whose physical or mental health would, or would be likely to be, endangered was identified by APHA. It is a significant leap to suggest that "upset" would, or would be likely to, endanger someone's mental health. There was no evidence available from, or in relation to, any potentially affected person to suggest that their mental health was such that "upset", whatever is meant by that, would be sufficient to endanger their mental health.
30. As regards the risk of endangerment to safety, again we reject the contention that APHA confirming or denying that the requested information was held would, or would be likely to, endanger anyone's safety. We were told that the Farm has been the recipient of correspondence from, and the subject of vigils by, those concerned for the welfare of animals, but there was no evidence before us of any violent protest by those people, or of any specific or threatened assault, or attempted assault, on the Farm, its workers, or its corporate owner's directors or employees.
31. The generalised assertions made by APHA as to the strong reactions stimulated by what all parties agree is the sensitive subject of pig farming and the general activities of those campaigning for animal rights and welfare are not sufficient, in

our view, to indicate that s38(2) FOIA is engaged. Nothing we were shown in CLOSED material nor anything we heard from Dr Williamson in CLOSED evidence altered our impression of this issue.

32. As the Tribunal has not found that s38(2) is engaged, it is not necessary for the Tribunal to consider the public interest arising under this exemption.

S43(3) FOIA

Was the information requested in the public domain?

33. The Appellant's first ground of appeal is that the Commissioner erred in concluding that s43(3) FOIA was even engaged on the facts of this case; specifically, he failed to address the fact that the location and identity of the Farm was already in the public domain at the time APHA refused to confirm or deny if it held the information requested, because of the following matters:
- a. APHA had published sufficient information by the grid reference of the temporary control zone it put in place over the Farm, and by descriptive reference to the geographical area of the Farm, to enable its identification.
 - b. Drone footage taken of the cull and posted on YouTube on 14 July 2022, gives an overhead shot of the Farm which enables its identification. This footage had, as at the date of the Appellant's skeleton argument, 26 February 2024, received 1,280 views (we were not told how many views it had received by the dates of APHA's refusal to confirm or deny if it held the information requested, 4 August and 21 September 2022).
 - c. Four press articles (published on 25 June 2022, 18 July 2022, 9 August 2022 and 11 August 2022, one by the BBC, the others by local press) had given the approximate geographical location of the Farm and identified the name of its corporate owner.
 - d. The corporate owner of the Farm had effectively "outed" itself by having a spokesman (identified as a spokesman of the owner by name) make a statement about the cull.
34. We do not accept that the information requested was already in the public domain at the time of APHA's refusal to confirm or deny it held the information requested. Whether or not something is in the public domain is a question of degree. Our view is that the most that the matters described by the Appellant demonstrate, is that there was sufficient information publicly available to enable a motivated individual, with background knowledge, to identify the Farm, should they wish to. That is a very different matter, in our view, from the Government agency responsible for surveillance of pig diseases confirming or denying to the world

that it holds information of the type requested in relation to a particular incident or investigation at a particular site. Recognising that is not unfairly to aggrandize the standing or influence of APHA. It is simply a proper acknowledgment of APHA's role and authority.

35. S43 FOIA is a prejudice-based exemption. The approach to be taken in prejudice cases was set out in the First-tier Tribunal decision of *Hogan v Information Commissioner* [2011] 1 Info LR 588, as approved by the Court of Appeal in *Department for Work and Pensions v Information Commissioner* [2017] 1 WLR 1:
- a. first: the applicable interests within the relevant exemption must be identified.
 - b. second: the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is "real, actual or of substance".
 - c. third: the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a "real and significant" risk of prejudice, or there "may very well" be such prejudice, even if this falls short of being more probable than not.

Applicable Interests

36. The most obvious applicable interests in this case are the commercial interests of the Farm's corporate owner, and its corporate group ("the Farm's commercial interests"). We reject any suggestion that because the Farm does not sell directly to the public, its interests are less likely to be prejudiced. As the Appellant indicated, it would be no great work of research by a motivated individual to identify the Farm, its corporate owner, and, consequently, its market, and we consider that the Farm's commercial customers' confidence in its product may be diminished to an extent equal to, if not more than, that of any member of the public purchasing directly.
37. APHA submitted there was also a risk of prejudice more widely to the commercial interests of the pig industry, the veterinary profession, and the rural economy generally. We do not reject that submission, but we do consider the prospects of those interests to be exponentially more distant than any likely, immediate or

imminent prejudice caused to the Farm's commercial interests by a confirmation or denial of the requested information being held in this case.

38. For completeness, we address the Appellant's submission in its grounds of appeal that the Farm's commercial interests were not legitimate because "*there is a strong chance that illegal activity took place, which the disputed information will shine more light on.*" The Farm's commercial interests are, so we understand, the breeding and marketing of pigs or pig products. That is a legitimate commercial activity. The possibility that within that enterprise a killing method may have been unlawful (which is not an issue before the Tribunal and on which we are not competent to opine in any event) does not detract from the overall legitimacy of the operation giving rise to the relevant commercial interest, and thus the interest itself.

The nature of the prejudice and the causal link

39. APHA's arguments and evidence as to the nature of the prejudice which would or would be likely to be caused, ranged, in our view, somewhat indiscriminately over a number of interests, as follows:
- a. a chilling effect on the willingness of farms and vets to engage voluntarily with APHA in terms of reporting a non-notifiable disease, which, in turn, would stifle APHA's disease surveillance function, including its ability to investigate, diagnose, and raise awareness of non-notifiable disease;
 - b. disincentivising farms and vets from co-operating with disease reporting and surveillance, causing the UK's international trading partners in live pigs, pork or pig semen (depending upon the type of unit involved) to doubt the integrity of the UK's disease reporting and surveillance systems, and consequently undermining market access;
 - c. disengagement from co-operation with APHA risking prompt notification of suspected cases of Foot and Mouth Disease (or other notifiable diseases), which could have devastating economic consequences not only for the pig sector but the wider, agricultural industry;
 - d. feeding a perception of some in the pig industry that, especially, at times of oversupply of pigs, an abattoir could decide to limit commercial risk to themselves by refusing to accept healthy pigs from herds with certain diseases;
 - e. unfairly damaging the reputation of certain vets;
 - f. giving a competitive advantage to other pig companies who would have information about the affected pig company on a disease about which they would not share their own information;
 - g. deterring UK trading parties from trading with the Farm's corporate owner.

40. Of all these, it seems to us that only the last two instances of prejudice to the Farm's commercial interests might be said to arise from any confirmation or denial by APHA that the requested information was held. The balance are more remote prospects, resting in a national and international loss of confidence in the UK's disease surveillance system which may, in turn, weaken confidence in UK pigs or pig products for export. We accept, of course, that long-term such matters might prejudice the Farm's commercial interests, together with those of other pig producers, but we do not consider that there is a sufficiently direct, causal link between confirming or denying the requested information is held in this case and those wider prejudices identified. Those matters seem to us to be more relevant to assessment of the public interest in favour of disclosure or non-disclosure, if the exemption is engaged.

41. The Tribunal had no direct evidence from the Farm's corporate owner as to the issue of prejudice. We note, however, from the OPEN version of APHA's response of 21 December 2022 to the Commissioner's investigation that the Farm's corporate parent (named in APHA's correspondence with the Commissioner) had advised APHA that it regularly participates in product tenders to supply supermarket retailers, and it was concerned that APHA confirming or denying it held the requested information would be used selectively and out of context by its competitors to seek to influence its retail customers to unfairly switch their supply and/or to exclude the company from future tenders. It had apparently also expressed great concern that APHA confirming or denying it held the information requested would be used by animal rights protest groups selectively and unfairly to seek to damage its commercial reputation.

42. Taking together the OPEN and CLOSED material addressing the issue of prejudice, we are satisfied that prejudice to the Farm's commercial interests would be real, actual and of substance.

The likelihood of prejudice

43. The question of the meaning of likelihood in the current context was addressed by the Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006): "*We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.*" In so doing, the Tribunal drew on the judgment of Munby J in *R (on the application of Lord) v*

Secretary of State for the Home Office [2003] EWHC 2073 (Admin) (a Data Protection Act case) who said: *“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”* [100].

44. We adopt the interpretation of *“likely to prejudice”* as meaning that the chance of the prejudice being suffered is more than a hypothetical or remote possibility; there is a real and significant risk.

45. Taking together the matters which Dr Williamson addressed in her OPEN and CLOSED evidence, we are satisfied that were APHA to confirm to the world whether it held such information, by its very authority and expertise, that would create a real and significant risk of prejudice.

46. We find that 43(3) FOIA is engaged in relation to the requested information.

The Public Interest

47. In considering factors in favour of disclosure, we accept that there is a public interest in disclosing information that promotes accountability and transparency to maintain confidence and trust in a public authority. We also accept that there is a significant public interest in animal welfare, and in the public being able to be confident that those persons and entities tasked with promoting it, and protecting animals, are accountable in that regard.

48. The evidence of Mr Stein, for the Appellant, was that there is little in the public domain in relation to mass animal culls and disease control measures; he considered the drone footage of the cull procured by the Appellant to be highly distressing, possibly involving illegal conduct; to understand whether a departure from the lawful methods of killing farmed animals is justified, whether by way of official derogation or otherwise, it is necessary to understand whether disease is present at the time of killing. He accepted that while the information requested by the Appellant may support a private prosecution against the Farm and may assist the Appellant in challenging APHA by way of judicial review if the cull was unlawful, those matters are not directly relevant to the consideration of the public interest, which is whether the cull was lawful per se.

49. We accept that there is a public interest in the lawfulness of the cull and in relation to APHA's oversight of it: see *Beloff v Pressdram Ltd* [1973] 1 All ER 241, where Ungood-Thomas J observed [260] that public interest covers "*matters, carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.*"
50. We also accept the Appellant's submission that the fact that the local authority had not prosecuted anyone involved in the cull is not determinative of whether the cull was lawful and cannot of itself be taken to satisfy the Appellant's concerns, which it is entitled to pursue by requests made of APHA under FOIA.
51. In our assessment of the public interest considerations which might justify maintaining the s43(3) exemption, we drew great assistance from Dr Williamson's oral evidence. Counsel for the Appellant subjected her to rigorous cross-examination. We considered her to be an impressive witness. Her oral evidence, particularly in CLOSED session, where she was able to expound freely, was evidently based on her substantial experience of the real-life consequences of pig disease identification for all those working in the pig industry.
52. In her OPEN evidence, she explained that she, in conjunction with the Department for Environment, Food and Rural Affairs ("DEFRA"), the Government's Veterinary Risk Group, and the Chief Veterinary Officer, work to assess disease threats for the need for Government intervention according to their impact on public health, animal health and welfare, international trade and wider society.
53. She explained that there are two types of relevant pig disease: statutory, notifiable disease, whose reporting to APHA by anyone suspecting or detecting it is a legal requirement, and non-statutory, non-notifiable disease, whose reporting is voluntary. Threats of particular concern which fall into the remit of scanning surveillance include non-notifiable and non-reportable exotic diseases which have not previously been detected in the UK livestock populations and new and emerging diseases. Vets attending livestock and wildlife engage voluntarily with APHA to access veterinary or scientific advice and the Government-funded diagnostic service. Information contained within the reports generated from such engagement is anonymised to prevent identification of the veterinary practices, livestock keepers and premises involved. The geographical location of livestock premises included in reports is never more specific than naming the county for the

same reason. This voluntary engagement, predicated on the pig industry's trust and confidence in APHA, including the understanding that APHA will not publish information which identifies precisely those who have engaged with APHA, is the cornerstone of the UK's disease surveillance operation, which Dr Williamson testified is world-leading. Without that voluntary engagement, APHA could not be effectively alert to new threats, and, as Dr Williamson put it, "*we incapacitate ourselves as a country.*" In her CLOSED evidence, she was able to give examples of her own experiences in specific cases where mutual trust and confidence between those in the pig industry and APHA had reaped substantial benefits for all concerned.

54. Counsel for the Appellant pressed Dr Williamson repeatedly to explain where farms' and vets' expectations of confidentiality to which she had alluded were recorded. She was unable to identify during her evidence any written policy or agreement with relevant stakeholders enshrining a promise of confidentiality by APHA, and accepted that in some cases APHA might make a limited referral of relevant information to another Government agency, for example the discovery of a potential toxic element to the Food Standards Agency, but she was clear that APHA do not place information about non-notifiable diseases associated with a specific farm in the public domain, and that the expectation of confidentiality is well-established.
55. We were persuaded by her OPEN and CLOSED evidence that this co-operative engagement rests on farms, vets and livestock industries having trust and confidence in APHA that the content of their engagement with APHA in relation to non-notifiable diseases will be kept confidential, and that absent that relationship of trust and confidence, there is a risk that that engagement will diminish, disease threats will consequently go undetected or take significantly longer to be detected, and APHA's function be frustrated. By her CLOSED evidence, Dr Williamson was able to provide a detailed account of APHA's concerns as to this risk in relation to the Appellant's specific requests.
56. Having considered Dr Williamson's evidence (with a particular regard for the thrust and detail of her CLOSED evidence) and balancing all the considerations in the round, we are satisfied that the public interest in disclosure at the time of APHA refusing to confirm or deny whether it held the information requested, was significantly outweighed by maintaining the exemption from disclosure pursuant to s43 FOIA.

57. Accordingly, we find that APHA was entitled neither to confirm nor deny it held the information requested pursuant to s43(3) FOIA, and the Commissioner's Decision Notices were in accordance with the law.

58. We dismiss the appeal.

Signed: *Judge Foss*

Dated: 22 July 2024

Promulgated on: 23 July 2024