Annex A

IR106 / FOI 2227– outcome of the Internal Review

By way of introduction it should be noted that targeted sampling of food businesses is carried out by local authorities to ensure food businesses are compliant with food law as part of their regulatory function.

The businesses which these sampling programmes focus on are determined by each local authority's own sampling programme, the FSA's national sampling priorities, which are designed to identify possible meat substitution, or as a result of intelligence from consumer complaints or inspections.

These results show that while the majority of food business are compliant, the sampling programme has been successful in detecting instances where a business has sold a product where another meat was detected above a quantity of 1%.

Local authorities are able to consider appropriate action to protect customers and improve compliance, which may include removing the food from the market or taking enforcement action such as prosecutions or cautions.

In my acknowledging your request for an internal review, I explained that my reply would also address the four supplementary questions you asked at the same time. I will start by providing answers to these as follows;

It says in the PDF that all samples were taken from "small independent businesses such as cafes, takeaways, butchers and grocers" - does that mean that you have not tested supermarket chains or their suppliers?

Samples are procured from supermarkets and are tested. The internal review re-commissioned the search of sampling data and found additional qualifying sample results. This detail is set out in Annex B and I can confirm that of the 145 samples caught in scope of your request 3 of these were procured at

supermarket locations. You should note that the term ‘supermarket’ has a broad application in this context and may include small, franchise food business operators.

*If you have tested supermarket chains and their suppliers, why was I not sent the data (I clearly requested **all** cases where meat has been mis-labelled)?*

The internal review found that the original search had not captured all relevant sample results. I interviewed the FSA official responsible and am satisfied that they acted in good faith. The system is something they are developing their understanding of and the issue arose from their not fully appreciating the use of ‘fail codes’ in the data. We have carefully re-checked the information and are satisfied that the figures presented here are accurate. We apologise for any inconvenience this has caused.

Is every sample tested in the same way? The reason I ask is that some go into detail about the sample being tested for x different types of DNA whereas others merely say x was found.

The analyst comments may differ in the way they are recorded as a result of being produced by different laboratories for 42 local authorities. Laboratories can use a range of different methods for meat speciation tests. Most will use a qualitative method using ELISA test kits to show absence or presence of a certain meat species whilst others will use polymerase chain reaction (PCR) which can give more quantitative results. Both methods are able to confirm the absence or presence of certain meat species.

If the tests only check for certain types of DNA, does that mean it is possible there is other meat in the sample that has not been tested for?

The majority of these tests state the samples were tested for beef, pork, sheep, goat, horse, chicken and turkey. These species represent the overwhelming majority of animals which are reared and slaughtered in the UK as well as the meat which is imported.

FOI Request 2227

Your original request, received by us 03 May 2018 was;

1. How many times in 2017 was meat found to have been mis-sold (as in, called one meat when in fact it was another) in the UK?

2. Can you provide specific details (dates, suppliers, meat type etc) of all cases where meat has been mis-sold in the way described above?

FSA response to FOI 2227

In its response of 29 June 2018, the FSA released details of 74 samples which were procured by Local Authority officials and subsequently found to be unsatisfactory for speciation. In each case the FSA withheld any information which might identify the food business operator or brand, engaging a number of exemptions at the time those being s.31(1) (g), s.31(2) (a) and (c) and s.43(2).

Request for an internal review

In your email of 02 July 2018, you set out your complaint as follows;

Firstly, I would like to challenge the FSA's decision to withhold the names of the brands/premises names involved in mis-selling meat. While I understand there could a commercial risk to these organisations, I believe the public interest comfortably outweighs the need to protect those that have done wrong, particularly as these brands/premises may be complicit in damaging people's religious choices with regards to not eating certain meat – the data you sent me includes samples of pork sold as lamb, which is completely unacceptable for Jews and Muslims. As the FSA guidelines themselves state, anything more than 1% contamination with another meat should be considered deliberate – meaning these brands/premises will have, on the whole, made a choice to trick people. Again, I say, the public interest outweighs the need to protect the businesses.

Outcome of the internal review

I have explained earlier that this review re-commissioned the search of sampling data and this found a greater number of results captured within scope of your request. This data is drawn from the UK Food Surveillance System (UKFSS).

There were 665 meat samples submitted on UKFSS by 80 Local Authorities in 2017. These were sent to public analyst laboratories for meat speciation testing and involved 487 food businesses, which included a mixture of supermarkets, retail shops, butchers, manufacturers, takeaways and

restaurants. A total of 145 samples were unsatisfactory. The detail of these samples is set out in Annex A which accompanies this letter.

I have earlier outlined that an error was made in the original search and I am confident that this review has now remedied that situation.

I have detailed earlier the FSA's use of exemptions and my review has found that in a small number of cases, such exemptions cannot justifiably be engaged to withhold the identifies of some food business operators. This concerns only those businesses which were successfully prosecuted and against which cases were brought, at least in part, directly because of meat samples obtained at site. At Annex B you will note that the identity of 3 food business operators is included. There is one other food business which was also successfully prosecuted (not a supermarket), but which went into new ownership prior to your request although trading under the same name. I consider in this case the exemption at s.43(2) can be engaged for the reasons set out below.

I will now move on to consider the FSA's use of exemptions under the FOI Act as it applies to <u>all other samples</u> caught within scope of this request.

<u>Section 31 (Law Enforcement)</u>

Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Section 31(1)(g) is engaged by reference to s.31(2) and therefore the FSA must be able to identify a public authority that has functions for one or more of the purposes specified in s.31(2) and that function or functions must be prejudiced by a disclosure.

In all instances the samples caught within scope of your request were procured by a local authority all of whom have a core regulatory function in ensuring compliance to food law. Authorised officers of a local authority have the power under the legislation to procure food samples, submit them for analysis and to take enforcement action where necessary.

In engaging this exemption, the FSA considered that the sampling work undertaken by local authorities was for;

- the purpose of ascertaining whether any person has failed to comply with the law (s.31(2)(a); and

- the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise (s.31(2)(c)

I found this assessment to be a correct interpretation of a local authority's function and conclude that the FSA was correct to engage s.31(1)(g) and by reference s.31(2) (a) and (c).

Section 31 is both a prejudice-based and a qualified exemption. This means that not only does the information have to prejudice all purposes listed, but, before the information can be withheld, the public interest in preventing that prejudice must outweigh the public interest in disclosure.

In engaging these exemptions, the FSA adopted the lower threshold of prejudice namely "would be likely to prejudice". Even here there must be a real and significant risk, even if risk of prejudice occurring is less than 50 per cent. In the original response I do not feel that the FSA adequately explained why it felt such prejudice might arise.

As a responsible enforcement body, it is for the local authority to lead an investigation into these cases and determine what action, if any, should be taken. The fact that a local authority intervention had occurred could be referred to by the local authority in future in the event of any recurrence of mislabelling or any similar authenticity issues and would inform the local authority's decision about future enforcement action. Disclosure of the information by the FSA would enable the public to form opinions on the company and its products and would then be likely to prejudice the local authority's ability to determine the course of its investigation and any enforcement action that might be justified.

Under the s.31 exemption, I reviewed the FSA's assessment of the public interest test. I note it considered the public interest in openness and transparency particularly in relation to the enforcement of food authenticity issues. However, it considered there was a stronger public interest in ensuring that the local authority's ability to take future enforcement action to secure compliance with food law is not prejudiced by the inappropriate and premature disclosure of information. I have commented earlier that I consider disclosure would be likely to cause prejudice to any enforcement action undertaken by a local authority. There is a strong public interest in ensuring compliance with relevant legislation and in ensuring that local authorities are not fettered in

their ability to perform their regulatory functions in relation to law enforcement by inappropriate disclosure of information.

The FSA was correct to take the view that it is reliant on retaining the confidence of local authorities that information supplied to the FSA will be used appropriately and proportionately and that the regulatory and enforcement role of the local authority will not be undermined by inappropriate disclosure.

I conclude that the balance of the public interest favours withholding this information under this exemption.

Section 43 (Commercial Interests)

Section 43(2) applies to information exempt if its disclosure under the FOI Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Again, this is both a prejudice-based and a qualified exemption.

A test to establish whether disclosure of information in scope would be prejudicial to an individual or company must be conducted and this prejudice must be more than a hypothetical or a remote risk. In order to apply section 43(2) to the information in scope, the FSA must be satisfied that disclosure would, or be likely to, prejudice the commercial interests of an individual or company.

Having reviewed the response to FOI 2227, again I conclude that the FSA did not adequately explain its measure of prejudice which it assessed at the lower threshold of 'would be likely to'. I do however conclude that this was the appropriate threshold to apply.

In applying this threshold, I have considered the following;

- Reputational damage to the food business operators or brands;
- A loss of confidence from within their customer base; and
- A misunderstanding or misrepresentation of the information by competitors giving rise to a commercial disadvantage.

The market in which these food businesses / brands operate is very competitive and is scrutinised significantly by its customer base and other

stakeholders. There is, I conclude, a plausible causal link between the disclosure of the information in question and the argued prejudice.

The FSA has direct experience of a food business suffering a commercial loss because of information released under FOI and whilst in the correct circumstances it is a justified step to take, we need to always carefully consider our duty under the FOI Act.

As a qualified exemption s.43(2) requires the consideration of whether the balance of public interest in disclosing the information outweighs that in not disclosing it. I note how the FSA conducted this test at the time of issuing its response to FOI 2227 and agree with the conclusions drawn.

In favour of disclosure is the public interest in increasing transparency and openness, particularly with regard to food safety. There is also a public interest in the consumer having the right to know that the food that they are buying and consuming is as described. Public confidence in the FSA depends on openness and transparency with regards to information about food, including instances where there is deliberate substitution of food.
However, against disclosure is the need to protect the legitimate commercial interests of companies or brands. Disclosure would enable the public to inform opinions about the establishment or brand. It would not be in the public interest to disclose information that could potentially identify a business, especially where the source of contamination has not been proven and where the incident has not resulted in prosecution.

It is not in the public interest to disclose information that would be likely to be used by competitors and weaken a business' position in an already competitive market.

Whilst I conclude that any misunderstanding arising amongst competitors (or others), might to an extent be mitigated by the FSA providing a clear context to the disclosure of any of the withheld information, overall the arguments relied upon in engaging this exemption are justified.

I conclude that the balance of the public interest favours withholding this information under this exemption.

In undertaking this review, I considered whether a further exemption might be engaged namely, s31(1)(c) which applies to information the disclosure of which would be likely prejudice to the administration of justice. This would

apply in my view to cases where the local authority has put in place an active compliance monitoring regime at a food business. The local authority may then decide, in the event of further evidence gathered from monitoring the company's compliance with food law requirements regarding labelling and authenticity, to pursue a prosecution for future similar non-compliances. In the FSA naming that food business it would put adverse information in to the public domain about the company's compliance record, which would be likely to affect its right to a fair trial. The FSA does not hold sufficient information about each case to determine this position but may need to consider this at any point in future.