

OPENNESS

Executive summary

1. The FSA was set up in April 2000 against a background of loss of public confidence in the food safety regulatory system, with critical decisions having been taken in secret. Since then, the FSA's independent status as a non-Ministerial Government Department and powers under the legislation have enabled an open and transparent approach to be developed and implemented in handling the assessment, management and communication of food safety issues.
2. This paper - as a precursor to a more wide ranging review of this subject - asks the Board for some immediate decisions in two specific areas; opening Board briefings to the public, and the naming of food companies. An opportunity is also taken to inform the Board about activity under the Freedom of Information Act.
3. The Board is invited to:
 - **consider** whether or not it would wish to experiment with allowing public attendance at some briefings;
 - **agree** that when publishing survey results we should normally continue to include factual information on the names of brands; and
 - **consider** (either now, or in correspondence with the Executive) whether further briefing or information would be helpful to the Board in its deliberations on this subject at a future meeting

CORPORATE AND BOARD SECRETARIAT DIVISION

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OPENNESS

Issue

1. To review two important elements of the FSA's approach to openness, as a precursor to a more wide ranging discussion later in the year.

Strategic Aims

2. This links to one of the Agency's three core values:
 - To be open and accessible

Background

3. The FSA was set up in April 2000 against a background of loss of public confidence in the regulatory system for food safety and standards. This loss of confidence was attributed, at least in part, to public suspicion that critical decisions about food safety were being taken in secret and that less weight was being given in these decisions to protecting consumers than to protecting the interests of the food industry. The status and powers given to the Food Standards Agency in our founding legislation - including the power to publish advice to Ministers in relation to public health issues¹ - have been critical in ensuring our advice is free from political influence and enabling us to develop an open and transparent approach. That, in turn, has moved food safety policy implementation away from the old sequential model of "assess, decide, tell" towards a more integrated and open one that has engagement with the public and with other stakeholders at its core. Some examples of how the FSA acts openly are set out at Annex A.
4. The Agency has a Code of Practice on Openness (CoP) which sets out a framework for operating in a way which enables us to meet our commitment to be open and accessible. That Code is currently being revised to take account of the Freedom of Information Act (FoIA) and will be put to the Board for approval later in the year. At that time, the Board will also have an opportunity to undertake a more wide ranging and strategic review of its policies and procedures to ensure they are open and accessible. In the meantime, there are two issues - making some Board briefings open to stakeholders, and the naming of companies - on which more immediate decisions are needed. The paper also includes some detail of activity undertaken under FoIA since this is relevant to the naming of companies.

¹ Section 19, Food Standards Act 1999

Board Briefings – Allowing Stakeholders to Attend

5. Board members will be aware that it is standard FSA practice to hold stakeholder working groups to improve dialogue and involve key interest groups, right from the early stages of policy development. The Board has also noted² arrangements put in place since May 2005 which require that, where proposals being considered by the Board rest on scientific evidence, the Chair of the relevant scientific advisory committee is invited to the table at Open meetings to provide an independent view on how their committee advice has been reflected in the relevant policy proposals.
6. Experts and stakeholders are also, on occasions, invited to brief the Board in closed session to facilitate subsequent debate at an Open Board meeting. In December 2003 the Board agreed to improve transparency by publishing, in Standing Orders papers, the subjects of any briefings together with the names of the people (subject to their agreement) or organisations briefing the Board. However, SFAC recently recommended³ that such closed session briefings should in future be held in public. This raises a number of issues. For example there is the question of the propriety of putting (as yet) unpublished research findings into the public domain; there is also the issue about experts possibly being unwilling to brief in public, or be as forthcoming in the presence of other stakeholders. Cost would also need to be considered, but there are economical options such as holding briefings on FSA premises (this would mean limiting attendance and requiring advance bookings). **The Board is asked to consider whether or not it would wish to experiment with allowing public attendance at some briefings.**

Naming Companies

7. The practice of naming companies in surveys was introduced by Ministers before the Agency came into existence. It was subsequently enshrined into FSA practice and guidance.
8. It has been the custom for the Agency to publish the results of surveys it conducts including those of the brands surveyed. Some surveys have looked at compliance with the law, while others review the extent to which best practice guidance is being followed. The Better Regulation Executive when reporting in October 2004⁴ suggested that naming individual companies that do not follow best practice guidance amounts to “regulatory creep”. In responding the Agency commented: “We welcome the Task Force’s recognition of our statutory responsibility for protecting the interests of consumers. We ... will give further thought as to the way that we present survey findings on best practice in future.”

² FSA Board, February 2006

³ Scottish Food Advisory Committee, April 2006

⁴ Better Regulation Task Force, October 2004 “Avoiding Regulatory Creep”

9. When the Agency consulted on the Strategic Plan 2005 - 2010, some industry responses objected to a perceived unfairness of the Agency in identifying businesses that did not follow *best practice guidance*, effectively applying the same reputational sanction as would apply to *legislative* non compliance. Comments were invited from stakeholders in 2005. Views were mixed, with consumer organisations favouring disclosure and industry preferring non-publication. Both SFAC and NIFAC have recently advised⁵ that surveys set up on a non-attributable basis do encourage more industry participation, reducing the risks of inadequate coverage.
10. One option open to the Agency is to take note of the Better Regulation Executive's criticisms, and move to a position of naming companies only when legislation is breached, while not doing so in relation to breaches of best practice guidance. But if we were to adopt this approach, it would be open to anyone to request, under the FoIA, the names of companies not put into the public domain. Information could still be legitimately withheld under FoIA if its release could otherwise prejudice the commercial interests of the company. But, in so doing, the Agency would have to be satisfied that the public interest in favour of withholding the information for that reason overrode the public interest in favour of disclosure. And in making such a judgement the Agency would have to take into account its important statutory duty under the Food Standards Act⁶ "to ensure that members of the public are kept adequately informed about and advised in respect of matters which the Agency considers significantly affect their capacity to make informed decisions about food". Although each case would be taken on its merits, we would expect in most instances that the appropriate course of action would be to disclose the information. And as NIFAC⁷ have pointed out, to risk having names of companies prised out of the Agency under FoI, rather than volunteering them in the first place, may be seen as failing to act in accordance with one of our core values.
11. **The Board is therefore invited to agree** that, on balance and consistent with our statutory duty, **when publishing survey results we should normally continue to include factual information on the names of brands.** In doing so any commentary would draw a clear distinction between legal requirements and best practice guidance.
12. More generally, the FoIA contains a number of exemptions under which information can be withheld from disclosure in certain circumstances. The extent to which the FSA has made use of these criteria for withholding information are set out at Annex B.

⁵ Scottish Food Advisory Committee, April 2006 and Northern Ireland Food Advisory Committee May 2006

⁶ Section 7 (2) of the Food Standards Act 1999

⁷ Northern Ireland Food Advisory Committee, May 2006

Risks

13. These include:

- by making some closed Board briefings open to stakeholders, scientists may be less forthcoming in what they say. But by keeping such briefings closed, the Board may come to an Open meeting with some elements of the debate having already taken place; and
- by disclosing names of those not adhering to best practice guidance the FSA will be accused of increasing the regulatory burden. But any decision not to disclose could mean the FSA being accused of rowing back from its key role of putting consumers first and acting openly.

Board Action Required

14. The Board is invited to:

- **consider** whether or not it would wish to experiment with allowing public attendance at some briefings;
- **agree** that when publishing survey results we should normally continue to include factual information on the names of brands; and
- **consider** (either now, or in correspondence with the Executive) whether further briefing or information would be helpful to the Board in its deliberations on this subject at a future meeting.

SOME EXAMPLES OF HOW THE FSA ACTS OPENLY

Holding open Board meetings.

The programme underway of pro-active engagement with consumers and stakeholders, maintaining timely communication throughout the end-to-end process of policy development and implementation, so that the openness and transparency of the FSA can be clearly demonstrated.

FSA has wide powers to publish⁸, and does publish, policy advice to Ministers in relation to public health issues, without needing Ministers permission to do so. Notable examples of where this has happened in the past include: dioxins in milk; over thirty month cattle entering the food chain; sheep TSEs; and folate (the latter two are ongoing issues).

Over 10m visits to the FSA web sites took place in 2005.

Developing working relationships with hard to reach consumer groups including those on low incomes and ethnic minorities.

Where proposals being considered by the Board rest on scientific evidence, the Chair of the relevant scientific advisory committee is now invited to the table at Open Board meetings to provide an independent view on how their committees advice has been reflected.

The Office of Science and Technology has acknowledged⁹ the Agency as leading the way in...opening up the scientific advisory process to public scrutiny.

⁸ The FSA does not publish all advice to Ministers – for example it would not do so over negotiating tactics, briefings for meetings, etc

⁹ Scientific Advice and Policy Making: Implementation of Guidelines 2000. Report by the Chief Scientific Adviser Professor David King. OST, December 2001

**FREEDOM OF INFORMATION ACT: EXEMPTIONS TO DISCLOSURE
YEAR: 2005**

	Number of requests
Total number ¹⁰	297
Of the 297, 103 were granted in full ¹¹ . For the remainder ¹² , there are a number of circumstances, set out in the legislation, where information may be withheld, but the principal ones of relevance to the FSA are as follows:	
(i) Information relates to the formulation or development of government policy ^a	6
(ii) Inhibition of free and frank provision of advice/exchange of views or other prejudice to the effective conduct of public affairs ^a	3
(iii) Information relating to law enforcement ^a	5
(iv) Personal Information, as protected by the Data Protection Act ^b	112
(v) Disclosure would be an actionable breach of confidence	8
(vi) Trade Secrets / Prejudice to Commercial interests ^{ab}	101

^a These exemptions are subject to a “public interest test” which require a judgement about whether the balance of the public interest is better served by disclosure or release.

^b In the vast majority of these cases, information was not disclosed in order to protect the interests of third parties

¹⁰ In 2005, 97% of requests received by FSA were sent an appropriate response within 20 working days.

¹¹ In common with other Government Departments, we have not logged normal business requests for information. On the other hand, where information is *not* going to be disclosed a request will automatically be logged along with the appropriate exemption which has been applied. The statistics are therefore skewed towards those occasions where information is *not* provided.

¹² Some requests under FoIA have had information withheld for more than one of the legal grounds mentioned.