

SCORES ON THE DOORS (SotD) - LEGAL ISSUES

Introduction

1. The Agency's Board is due to discuss the results of a public consultation on proposals for a UK-wide SotD scheme for providing consumers with information about hygiene standards in food businesses at its meeting in December 2008. It is critical that such a UK-wide SotD scheme is legally robust and is fair to businesses. The scheme must be designed such that the highest rating equates to no more than compliance with the legal requirements on food hygiene such that any business, irrespective of the nature or size of its operation, can attain this. The various legal questions, together with the Agency's views on these, are outlined below. These views may be affected by the detail of the scheme that is eventually adopted and so will be considered again following the December Board meeting.

Does the Agency have powers to propose and endorse a UK-wide SotD scheme?

2. The Agency's powers are set out in the Food Standards Act 1999 and the following are considered to give the Agency the power to propose and endorse a national SotD scheme, because the main aim of the scheme is to inform consumer choice:

- section 1(2) - this defines the main objective of the Agency as protecting public health from risks which may arise in connection with the consumption of food and otherwise protecting the interests of consumers in relation to food;
- section 6 - this gives the Agency the function of developing policies (or assisting in the development by any public authority of policies) relating to matters connected with food safety or other interests of consumers in relation to food, and of providing advice, information or assistance in respect of such matters to any public authority;
- section 7 - this gives the Agency the function of providing advice and information to the general public in respect of matters connected with food safety or other interests of consumers in relation to food, and of providing advice, information or assistance in respect of such matters to persons who are not public authorities;
- section 21 - this provides a very broad supplementary power which further supports the view that the Agency is able to propose and endorse a national SotD scheme.

Do local authorities have powers to operate a SotD scheme and to put the results in the public domain under the existing legal framework?

3. As the operation of a SotD scheme requires the involvement of local authorities, the Agency could not reasonably promote such a scheme if local authorities themselves had no power to implement this. The Agency's view is that such powers are available to local authorities within the existing legal framework other than in relation to Northern Ireland where such powers have not been identified (see para 5 below).

4. The food hygiene regime applicable across the UK effectively imposes duties on local authorities to enforce the legal requirements but does not contain powers to promote food safety beyond that. This legislation does not, therefore, provide legal powers for operating a SotD scheme or for publishing the scores. Consequently, if local authorities have the power to undertake SotD it is not contained in the food hygiene regime and must be provided elsewhere. Section 2 of the Local Government Act 2000 (which covers England and Wales) gives local authorities powers to do anything which they consider is likely to achieve the promotion or improvement of the economic, social or environmental well-being of their area. A SotD initiative could seek to achieve any one or more of those objectives. The Local Government in Scotland Act 2003 includes equivalent 'well-being' powers at section 20.

5. The Local Government Act (Northern Ireland) 1972 does not contain 'well-being' powers. In the absence of such powers it is considered unlikely that local authorities in Northern Ireland can legitimately operate a SotD scheme or put the results into the public domain in the appropriate format. There is a proposal to include such powers in legislation to implement the review of public administration in Northern Ireland which is planned for May 2011. Pending this, it is considered that section 8(1) of the Food Standards Act 1999 allows the Agency itself to obtain and collate information gained from local authority inspections, and to interpret and translate the information received into 'gradings' for the purposes of SotD. Sections 7(1)(a) and 19(1)(c) of the Act, taken together, give the Agency the power to publish the information. This obviously has practical and resource implications for the Agency but, in the absence of a 'well-being' power of the sort found in the rest of the UK, it is the Agency's view that this is a route by which SotD can lawfully operate in Northern Ireland. It would involve the Agency putting information into the public domain that it itself had analysed and come to a conclusion about rather than simply acting as a vehicle for publishing information that third parties had supplied to it.

6. The initial inspection at which a score is given must be undertaken as a lawful exercise of the power of entry for usual inspection purposes. The powers of entry and inspection for such inspections are included in the Food Hygiene (England) Regulations 2006 (as amended), and the parallel legislation in Scotland, Wales and Northern Ireland, and we consider that the repackaging of inspection findings following the exercise of these powers for a legitimate purpose is permissible in Great Britain. These powers could not be used for inspections specifically for the purposes of SotD but if a business voluntarily asks for an inspection then that invitation provides the necessary authority to permit entry.

What elements of a SotD scheme are necessary to ensure against issues of defamation or malicious falsehood?

7. The Agency considers that there are at least six elements that are critical in this respect:

- a mechanism must be in place to provide business with an opportunity to request re-inspection for the purposes of re-scoring where they have undertaken action to rectify any non-compliances;
- an appeal mechanism must be available to those that perceive an injustice in the way the scheme is being administered - the appeal should be determined by a person who did not make the original decision;

- consideration needs to be given as to how quickly after inspection the results are published on any website and care needs to be taken as to how the scheme is advertised on that website, particularly if there is a re-inspection opportunity;
- a clear articulation of what the scheme is (including that it is a snapshot in time) should be available on any website or other material available about the scheme;
- information about the scheme and marketing type information (for example reviews or other evaluative information relating to businesses such as tourism information) should be kept distinctly separate; and
- the use of symbols or descriptors that might have negative connotations should be avoided as questions of defamation could arise - the use of neutral symbols would be preferable.

What is the relationship with Article 6 of the European Convention on Human Rights?

8. Article 6 of the European Convention on Human Rights is broadly described as the right to a fair hearing 'in determination of civil rights and obligations'. It is broad enough to cover reputation and good name. It is not certain whether this Article is engaged by SotD so it is considered that it is best to assume that it is and accept that SotD involves a determination of the food business operator's civil rights and obligations since the score affects his reputation and good name. In view of this, it is considered that any SotD scheme should avoid the use of negative symbols and descriptors, and that mechanisms are put in place to ensure a fair hearing in the event of a dispute.

What is the relationship with the Freedom of Information Act?

9. The Agency considers that it is not possible to use the Freedom of Information (Fol) Act 2000 as the source of the power to publicise SotD. As the Information Commissioner has indicated that this type of information ought to be in the public domain, proactive disclosure is consistent with the Act.¹ SotD is in the nature of a voluntary release of information rather than being prompted by a Fol request. The Agency's view is that it would be an improper use of the Fol Act to require people to make a purported Fol request before they were given access to SotD information. This is not least because the nature of the request (the submitter is required to search a website stating that he is making a request when he clicks the relevant button) is not considered to be a request in accordance with the Act since the formalities required by section 8 of the Act (request to be in writing, to state the name and address of the applicant and to describe the information requested) are not complied with. In the Agency's view, the Fol Act cannot be the source of the power to publish SotD information.

10. Information about pro-active publication of SotD information by the Agency in relation to Northern Ireland (where it appears that under the applicable local government legislation local authorities do not yet have powers to operate a SotD scheme or put the results into the public domain) and by local authorities in relation to the rest of the UK (where local authorities do have such powers) should be included in the publication schemes that public authorities like the Agency and local authorities are required to adopt, maintain and review under section 19 of the Fol Act. By virtue of

¹ ICO press release, 14 December 2005, Freedom of Information secures release of restaurant reports (see: http://www.ico.gov.uk/upload/documents/pressreleases/2005/restaurants_press_release_dec_2005.pdf).

section 20 of the FoI Act, the Information Commissioner may approve model publication schemes and he has approved a uniform model publication scheme under that section that all public sector bodies should adopt from 1 January 2009. Since it is considered that local authorities in Northern Ireland do not yet have the appropriate legal powers to put information into the public domain in the format needed for SotD purposes and SotD information relating to Northern Ireland would have to be put into the public domain by the Agency, information concerning that practice would have to feature in the Agency's FoI Act publication scheme rather than those adopted by the local authorities.

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