

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 December 2010

Public Authority: Department for Environment, Food and Rural Affairs
Address: Ergon House
Horseferry Road
London
SW1P 2AL

Summary

The complainant requested specific information considered or generated by the Tuberculosis Eradication Group who were to advise the Secretary of State on bovine tuberculosis and its eradication in England. The public authority ultimately withheld only a minority of the requested information and did so by relying on section 35(1)(a) and 41 of the Act. The Commissioner first determined that, after considering the withheld information, it was not environmental information. The Commissioner next determined that the exemption provided by section 35(1)(a) was engaged and the public interest favoured the maintenance of the exemption.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Tuberculosis Eradication Group (TBEG)¹ is an advisory body, whose remit is to make recommendations to the Secretary of State on bovine TB (bTB) and its eradication in England. One of its functions

¹ <http://www.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/tb/partnership/eradication-group/index.htm>

was to consider the options available to address infection in cattle and to reduce the risk of transmission between cattle and wildlife. On 8 October 2009 TBEG presented its Progress Report² to its stakeholders including the Department for Environment, Food and Rural Affairs ("the public authority").

The Request

3. The complainant made a request under "the Freedom of Information Act (FOI) 2000 and the Environmental Information Regulations (EIR) 2004" to the public authority on 11 February 2009 for information concerning the Bovine TB Eradication Group ("the Group"). In particular he requested:
 - A copy of the presentation from the Veterinary Laboratories Agency (VLA), given to the Group on 15 January 2009.
 - A copy of the presentation on the bovine TB research programme given to the Group on 28 January 2009 by the Head of TB Science.
 - A copy of the presentation on the bovine TB Programme Budget given to the Group on 10 February 2009 (by a person whose name is not reproduced here for reasons of confidentiality).
 - A copy of the presentation on the TB Vaccines Programme given to the Group on 10 February 2009 (by a person whose name is not reproduced here for reasons of confidentiality).
 - A copy of the paper discussed by the Group on 10 February 2009, looking at "possible control strategies for controlling badgers in high prevalence and edge of high prevalence areas".
 - A copy of the update on "on how Disease Report Forms are used to assess and record the details of a breakdown" given to the Group on 10 February 2009 (by a person whose name is not reproduced here for reasons of confidentiality).
4. The public authority provided a response to the complainant on 19 March 2009 in which it stated that it had received the information request on 18 February 2009. The public authority provided some of the requested information but withheld further information on the

² <http://www.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/tb/documents/tb-erad091008.pdf>

basis of the exemption contained in section 35 of the Act. The complainant, in letters dated 29 April and 9 June 2009, requested the public authority to review its decision. Whilst the public authority acknowledged this correspondence and stated it would review its decision ultimately it did not do so

5. The public authority released further information, during the course of the Commissioner's investigation, to the complainant under cover of an email dated 4 June 2010. As a result the only information ultimately withheld by the public authority was that within the paper discussed by the Group on 10 February 2009, looking at "possible control strategies for controlling badgers in high prevalence and edge of high prevalence areas".

The Investigation

Scope of the case

6. On 26 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner, following the release of further information during the investigation, came to restrict the investigation itself to the information the public authority ultimately withheld.

Chronology

7. The Commissioner wrote to the public authority on 16 September 2009 requesting a copy of the withheld information and further clarification as to its reasons for withholding it.
8. By way of a letter dated 13 October 2009 the public authority provided the Commissioner with a copy of the withheld information and clarification regarding its use of the exemptions to withhold it. The public authority (in later correspondence dated 11 May 2010) informed the Commissioner that as well as relying on section 35(1)(a) it would also rely on section 41 to withhold the same information.
9. In further correspondence to the Commissioner (dated 10 August 2010) the public authority further explained that the withheld information candidly provided the views of a TBEG member on eradicating bTB in England. It stated that the information provided the public authority and government ministers with well considered

views by a person with first hand practical experience and, as a result, this “valuable information” helped to inform government decision making in this “highly controversial” area of ongoing policy development.

Analysis

Is the information environmental?

10. The Commissioner first decided whether the withheld information was environmental information as defined by the Environmental Information Regulations (EIR). This is because of the wording of the request, particularly as it was made with reference to the Act and the EIR. (Regulation 18 provides that the EIR shall be enforced by the Commissioner.) The Commissioner, having viewed the information held falling within the scope of the request, takes the view that it is not environmental information as defined by the EIR.

11. The definition of “environmental information” is set out in regulation 2(1) of the EIR. This states that: “environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

 - (b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

 - (d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)....."

12. The Commissioner considers that the phrase "any information ... on" should be interpreted widely and that this is in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enacts. Therefore 'any information on' will usually include information concerning, about or relating to a particular measure, activity, or factor in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
13. Having viewed the information held falling within the scope of the requests the Commissioner takes the view that the information which continues to be withheld is not environmental information as defined by the EIR. The information is about the epidemiology of a disease in bovine and badger populations and to some extent how the disease may or may not be eradicated. However the information is not on matters that will have an effect on the environment as defined and referred to above and it does not therefore fall within the ambit of the EIR.
14. The Commissioner next considered whether the information falls within the definition concerned with the state of human health and safety. This is because the information is concerned with the infection in cattle and reducing the risk of transmission between cattle and wildlife. It does not therefore fall within the ambit of the EIR, relating to human health and safety, and therefore the Commissioner next considered the applicability of the Act.

Exemptions

15. The public authority, to withhold the remaining information from the complainant, relied on section 35(1)(a) which provides an exemption for information that relates to the formulation and development of government policy. This is a class based exemption,

which means that if the information conforms to the class described in section 35(1)(a), it is exempt. This exemption is qualified by the public interest, meaning that the information falling within its class should still be disclosed if the public interest test in the maintenance of the exemption does not outweigh the public interest in disclosure.

16. There are some specific qualifications to the exemption. In particular, section 35(2) provides that statistical information used to provide an informed background to a decision that has been taken is not to be regarded as exempt. The Commissioner notes that a government decision on its policy of badger control is scheduled to be made in early 2011³. Accordingly, though there is statistical information within the withheld information, the Commissioner finds section 35(2) is not applicable in the context of this matter.
17. Policy is not a precise term and to some extent what is regarded as policy depends on context. However, there is a general consensus that policy is about the development of options and priorities for ministers, who determine which options should be translated into political action and when. Policy is unlikely to include decisions about individuals or to be about purely operational or administrative matters.
18. Having viewed and considered the withheld information the Commissioner accepts the validity of the public authority's assertion that the withheld information was generated to facilitate policy development regarding the government's approach to bovine tuberculosis in England. Consequently the Commissioner is satisfied that section 35(1)(a) was engaged as regards the withheld information at the time of the request for information.
19. The Commissioner therefore next considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The arguments below were advanced by the public authority and the complainant.
20. **Public interest arguments in favour of disclosing the withheld information**
 - Contribute to the public's understanding of the policy issues surrounding bTB and the possibility that the disease is spread by badgers.

³ <http://www.defra.gov.uk/corporate/consult/tb-control-measures/100915-tb-control-measures-condoc.pdf>

- Facilitate the public scrutiny of DEFRA's policy formulation regarding bTB.
- Greater transparency makes government more accountable to the electorate and increases trust.
- As knowledge of the way government works increases, the public contribution to the policy making process could become more effective.
- The public interest in being able to assess the quality of advice being given to ministers and used in subsequent decision making.
- The greater the impact on the country or on public spending the greater the public interest may be in the decision-making process being transparent.

21. **Public Interest arguments in favour of maintaining the exemption**

- Candour ensures that the policy development process is effective.
- Decisions should be based on comprehensive advice which is not fettered by the fear of undue public exposure.
- If the information were disclosed, it would deter the writer of the paper and other potential valuable contributors from submitting their views in future and thus undermining the proper formulation of policy.

Balance of the public interest arguments

22. The Commissioner's view is that although the withheld information falls within the class specified in the exemption this is not, in itself, of relevance to the balance of the public interest. This view accords with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard (EA/2006/0006)*, where it stated in connection with section 35(1)(a) that "the weighing [of the public interest] exercise begins with both pans empty and therefore level" (paragraph 65).
23. The Commissioner will, when considering the application of the public interest test, do so in the context of the time the information request was made. This view reflects that taken by the Information

Tribunal in *DBERR v the Information Commissioner and the Friends of the Earth* (EA/2007/0072).

24. Safe space and chilling effect arguments can be made in relation to the public interest test under section 35. "Safe space" arguments are about the need for a "safe space" to formulate policy, debate "live" issues", and reach decisions without being hindered by external comment and/or media involvement. They are related to, but not the same as "chilling effect" arguments, and care should be taken to differentiate between these two concepts. The Commissioner's view is that, whilst part of the reason for needing a "safe space" is to allow free and frank debate, the need for a "safe space" exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under the Act. "Chilling effect" arguments are directly concerned with the argued loss of frankness and candour in debate or advice which has been claimed would result from disclosure of information under the Act.
25. The public authority in correspondence to the Commissioner expanded upon its reliance on section 35(1)(a) in particular on the issue of the safe space needed for proper policy formulation. The public authority, in support of its position, referred to the Information Tribunal's dicta in *Scotland Office v The Information Commissioner* (EA/ 2007/0070) regarding "the importance of preserving confidentiality of policy discussion in the interest of good government"; this covers the idea that the policy making process should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement.
26. The Commissioner recognises that the thinking behind the exemption is that it is intended to prevent harm to the internal deliberative process of policy-making. In this case the public authority's arguments for maintaining the privacy of the withheld information are essentially that the threat of public exposure of this information will lead to less candid and robust discussions about policy, a fear of exploring extreme options, hard choices being avoided, and good working relationships and the neutrality of the civil service being threatened. Ultimately the quality of government policy making could be undermined. Having regard to the withheld information the Commissioner, noting its potential for controversy, accepts the validity of the contentions of the public authority.
27. The public authority in its correspondence (dated 20 August 2010) to the Commissioner said that releasing the withheld information would have a "... definite chilling effect and would deter the writer of

the paper and other potential valuable contributors from submitting their views in future. This would result in a paucity of good quality information being received by government when formulating and developing policy and so government decision making would be the poorer for this". The Commissioner gives weight to the arguments that disclosing information relating to a particular policy, whilst that policy is still being formulated/developed, could affect the frankness and candour with which relevant participants would continue to contribute to that particular policy making process. The Commissioner, having regard to the withheld information, the time it was requested and the controversy surrounding the bTB debate accepts the merit in this contention of the public authority in this particular case. He accepts that releasing the information would likely draw a response from some that would likely not facilitate further frank and candid contributions from TBEG members. This in turn would hamper and stymie the group's purpose of providing a comprehensive consideration on bTB and its eradication on England

28. In the context of this matter the Commissioner notes that the information requested was for information that had been presented to the group in February 2009, the same month in which it was requested. It is clear to the Commissioner that the policy process was certainly very much on-going at the time of the request and this is the very period where the public interest is well served by allowing policy makers time to consider and digest the information free from the glare of lobbying and media interest. Similarly the Commissioner recognises that the issue of badger control, as a means of curtailing bTB, can generate (both for and against) strong public feelings and again the public interest is better served by allowing policy makers space to consider matters.
29. However, the Commissioner also gives due weight to the public interest factors that favour the release of the withheld information. Increased government accountability and transparency are eminently desirable for a democratic society and therefore must be weighed accordingly in the balancing exercise. The Commissioner takes cognisance of the arguments in favour of disclosure, in particular that releasing the information would add to the public's knowledge and understanding of the relevant issues such as the controlling or not controlling of the badger population. He is also attuned to the value of being able to contribute to a public debate before a final decision has been taken. However the Commissioner is also of the view that good decision making is greatly based upon open good advice and discussion (as more fully discussed above) where even unpalatable or unpopular measures are postulated and discussed.

30. In this case the Commissioner is particularly swayed by the fact that at the time of the information request the withheld information was relatively new to those that would be considering it as part of the policy formulation process. The Commissioner is of the view that releasing the information at such an early stage - especially having considered its content and compared it to that which has been released - would have likely, on the balance of probabilities, inhibited future contributions from some members of TBEG. He believes that this would be an avoidable hindrance of TBEG's purpose.
31. Balancing and considering the varying public interest factors as applied to the circumstances of this case the Commissioner's decision is that the public interest in maintaining the exemption outweighs the public interest in releasing the information.
32. Since the Commissioner has decided that the public authority properly relied on the exemption provided by section 35(1)(a) to the remaining information he did not go on to consider the applicability of section 41.

The Decision

33. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

34. The Commissioner requires no steps to be taken.

Other matters

35. Although they do not form part of this decision notice the Commissioner wishes to comment upon the public authority's failure (when asked by the complainant) to conduct a review of its decision not to communicate some of the information requested to him.
36. Internal reviews are referred to in the Code of Practice, issued pursuant to section 45 of the Act. Paragraph 39 of the Code

encourages authorities to '...provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue'. The Commissioner therefore, noting the absence of a review, expects that the public authority ensures that all future internal reviews are carried out in accordance with the guidelines in the section 45 Code of Practice.

Right of Appeal

37. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 13th day of December 2010

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Relevant Statutory Obligations and Provisions under the Act

General Right of Access

Section 1(1) provides that -

"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."

Time for Compliance

Section 10(1) provides that -

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

- (c) it was obtained by the public authority from any other person (including another public authority), and
- (d) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”