Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **26 March 2015**

Public Authority: **Department for Environment, Food and Rural Affairs**

Address: **Nobel House**
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposal to repeal section 1 of the Breeding of Dogs Act 1973 (the 1973 Act) under part 6, schedule 20 of a Deregulation Bill. The Department for Environment, Food and Rural Affairs (Defra) considered that the relevant information it held related to the formulation of government policy and was therefore exempt information under section 35(1)(a) of FOIA. It further found that that on balance the public interest favoured maintaining the exemption. The Commissioner's decision is that section 35(1)(a) of FOIA was correctly applied but that, in all the circumstances, the public interest favours disclosure. The Commissioner therefore requires Defra to disclose the requested information it refused under section 35(1)(a).

2. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

3. On 1 July 2014 the complainant contacted Defra and requested the following information:

> *"Please can you provide details of any reported discussion, consultation or other papers which relate to the decision to include repeal of Section 1 of the Breed of Dogs Act, 1973 under the Deregulation Bill, Schedule 20, Section 6. Specifically, any reports, notes etc that provide the basis or rationale for the clause in the Deregulation Bill."*

4. Defra responded on 22 August 2014. It explained that the requested information was exempt information under the 'formulation or development of government policy' exemption (section 35(1)(a)) in FOIA. As section 35 is a qualified exemption, Defra considered the public interest and found that on balance the public interest favoured withholding the information.

5. The complaint wrote to Defra on 2 September 2014 and asked it to reconsider its refusal of the request, arguing that the public interest case for disclosure was compelling. Defra therefore carried out an internal review into its handling of the request, the outcome of which was provided on 25 November 2014. The reviewer apologised for the time it had taken to complete the review and, with reference to a point made by the complainant, also accepted that its initial response should have been more specific as to the nature of the harm caused by disclosure. The reviewer nevertheless upheld Defra's original reliance on section 35(1)(a) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 2 December 2014 to complain about Defra's refusal to disclose the information he had requested with regard to the proposed repeal of section 1 of the 1973 Act.

7. Defra has informed the Commissioner that it is only seeking to rely on section 35(1)(a) to withhold the requested information. The Commissioner's view on the application of the exemption is set out in the remainder of this notice.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

8. Section 35(1)(a) of FOIA states that information held by a government department, or by the National Assembly for Wales, is exempt information if it relates to the *formulation or development of government policy*.

9. Section 35 is a class-based exemption. This means that section 35(1)(a) will automatically be engaged if the information relates to one of the activities – either the *formulation* or *development* of government policy – described in the exemption. Section 35(1)(a), as with other limbs of the exemption, is also qualified by the public interest test.

10. In his guidance on the exemption[1] the Commissioner explains that the *'purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private'* (paragraph 23).

11. Breaking down the terms of the exemption itself, it is necessary for the requested information not only to relate to government policy but also to relate to the formulation or development of that policy. However, differently constituted Information Tribunals have found that the meaning of 'relates to' in the exemption can be interpreted broadly.

12. What is meant by 'government policy' is not defined in FOIA but it is common ground that it may be made in a number of different ways and take a variety of different forms. The withheld information in this case comprises a note of a discussion about whether to remove certain requirements for licensed dog breeders. This took place in the context of a wider drive to strip away unnecessary burdens on businesses by simplifying and streamlining current regulations. Defra considers this discussion note relates to government policy. The Commissioner agrees.

[1] https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf

13. The next step for the Commissioner is therefore to establish whether the disputed information relates to either the *formulation* or the *development* of government policy. In this case Defra has argued that the information concerns the formulation of government policy.

14. As expressed in his guidance (paragraph 43), the Commissioner 'understands the term 'formulation' of policy to refer to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a minister who then decides which options should be translated into political action.' The 'formulation' of government policy should be contrasted with information relating to the 'implementation' of policy, which will not be covered by the exemption. However, the Commissioner recognises that it is not always an easy task to identify exactly when the formulating process has ended and the process of implementation has begun.

15. Section 1 of the 1973 Act requires licensed dog breeders to keep records in a prescribed form. Defra has explained that the proposed repeal of the dog breeding record keeping requirements was being taken forward as part of the 'Red Tape Challenge' and was not initially considered to be controversial.

16. The Red Tape Challenge is a government initiative that has the clear aim of reducing the overall burden of regulation. On 27 January 2014, the Prime Minister announced that the government had achieved the target of identifying 3000 pieces of regulation to be scrapped or improved, with the help of the public, business and other organisations.[2] In Defra's own proposal-document for the Red Tape Challenge[3], which was produced in January 2014, it states that:

    Defra proposes to revoke the Breeding of Dogs (licensing Records) Regulations 1999 [a statutory instrument that amended the 1973 Act] *as these will largely be replaced by the new legislation on microchipping from 2016. In order to do this, the parent legislation must also be amended.*

[2] http://www.redtapechallenge.cabinetoffice.gov.uk/about/

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275742/red-tape-challenge-agriculture-proposals.pdf

17. Insofar as the withheld information represents an early stage of government decision-making regarding the possible repeal of legislation, the Commissioner accepts that not only does the information relate to government policy but also to the formulation of that policy; identifying at an early stage in the process the options available with regard to overhauling dog breeding legislation. It therefore follows that section 35(1)(a) of FOIA is engaged and the Commissioner has gone on to consider the public interest test.

Public interest test

18. The complainant and Defra have made a number of arguments to support their respective positions for and against disclosure. The Commissioner has considered each of these arguments, although for the present purposes he has felt it appropriate to summarise the essence of the points made.

Public interest arguments in favour of disclosure

19. The complainant considers that two principal arguments lend considerable weight to the position for further transparency.

20. Firstly, the complainant considers important the status of the proposed changes when the request was made. The complainant is aware that the Deregulation Bill was before Parliament at that time. However, he disputes Defra's contention that the particular amending clause referred to in the request could be subject to change. Rather, the complainant considers the introduction in March 2014 of a specific, complete amendment with a supporting explanatory statement by the government lead on the Bill, the Solicitor-General, should be interpreted as the culmination of an important stage in the development of policy. In the complainant's view, it follows from this that the pressing need for safe space to consider policy options had effectively been removed.

21. Secondly, and notwithstanding the argument outlined above, the complainant considers that the weight of the wider public interest in disclosure is overwhelming. This strength derives from the combination of a number of different factors, namely the potentially serious detriment the amendment could have on the ability to monitor and enforce good dog breeding practices, the lack of prior consultation about the introduction of the amendment, and the absence of any specific arguments that explain how disclosure of the information that has actually been requested could have a harmful effect.

22. The Commissioner is aware that a number of different individuals and organisations have expressed concerns about the effect of the amendment. In particular, it is considered that the introduction of legislation requiring the microchipping of dogs does not weaken the need for comprehensive dog breeding records. On this position, the proposal to revoke the requirement for dog breeding records to be kept in a prescribed form risks undermining the ability to monitor poor dog breeding practices. This precise point was expanded on by the Chairman of the Advisory Council on the Welfare Issues of Dog Breeding, Professor Sheila Crispin, in a letter to Lord Wallace of Saltaire in July 2014[4].

Public interest arguments in favour of maintaining the exemption

23. Defra shares with the complainant the view that the timing of the request is a critical consideration when deciding where the balance of the public interest lies, albeit its findings are the reverse of the complainant.

24. Contrary to the complainant's assertion, Defra considered that the policy formulation stage had not come to an end by the time the request was made. Not only was the Deregulation Bill itself before Parliament, and therefore possibly subject to amendment and therefore policy revision, but Defra has also explained that the repeal of the relevant section of the 1973 Act will not have effect until the compulsory microchipping of dogs comes into force in 2016. On this latter point, Defra claims it is still developing policy on how and when the repeal should come into force. Defra does acknowledge the complainant's concerns regarding the lack of prior consultation on the amendment but it has informed the Commissioner that it is planning to launch a consultation and any decision to commence with the proposed changes may rely on the outcome of that consultation.

25. It is therefore Defra's view that the question of what amendments to dog breeding license legislation was appropriate was not settled at the time of the request. Allowing that the policy issues therefore remained live, Defra argues that at that moment it still required room in which to discuss ideas and debate contentious proposals away from external interference and scrutiny; the so-called 'safe space' argument.

[4] http://www.apgaw.org/Data/Sites/1/dog-advisory-council-letter-regarding-deregulation-bill-080714.pdf

Balance of the public interest

26. In his guidance the Commissioner emphasises that there is no inherent or automatic public interest in withholding information just because it falls under the class-based 'formulation or development of government policy' exemption. He also says that public interest arguments should always relate to the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Bearing this approach in mind, arguments that 'routine' disclosure would be contrary to the public interest are in the view of the Commissioner misconceived.

27. As stated previously, the inclusion of section 35(1)(a) in FOIA was designed to protect the integrity of the policy making process by permitting government space to consider policy options in private. In *Department of Health v Information Commissioner, Healey and Cecil* (EA/2011/0286 & EA/2011/0287, 5 April 2012) (the DoH decision)[5] the Information Tribunal considered the relationship between section 35(1)(a) and the safe space argument. The Commissioner considers it helpful here to set out the Tribunal's introduction to this relationship.

28. We are prepared to accept that there is no straight line between formulation and development and delivery and implementation. We consider that during the progress of a government that the need for a safe space will change during the course of a Bill. For example while policy is being formulated at a time of intensive consultation during the initial period when policy is formed and finalised the need for a safe space will be at its highest. Once the policy is announced this need will diminish but while the policy is being debated in Parliament it may be necessary for the government to further develop the policy, and even undertake further public consultation, before the Bill reflects the government's final position on the new policy as it receives the Royal Assent. Therefore there may be a need to, in effect, dip in and out of the safe space during this passage of time so government can continue to consider its options. There may also come a time in the life of an Act of Parliament when the policy is reconsidered and a safe space is again needed. Such a need for policy review and development may arise from implementation issues which in themselves require Ministers to make decisions giving rise to policy formulation and development. […] *However the need for safe spaces during this process depends on the facts and circumstances in each case. Critically the strength of the public*

[5] http://www.informationtribunal.gov.uk/DBFiles/Decision/i729/2012_04_05;%20DOH%20v%20IC%20%20Healey%20final%20decision.pdf

interest for maintaining the exemption depends on the public interest at the time the safe space is being required.

28. At the time of the request an announcement had been made stating the intention to amend the 1973 legislation, ending the first phase of the formulation and development of policy. However, the policy was being debated within Parliament, which following the construction of government policy described in the DoH decision meant that further safe space might be required. The Commissioner does not therefore agree with the complainant that the announcement of the legislative amendment meant that the process of policy development had been concluded. Rather, in respect of timing, the Commissioner considers that the status of the policy would reinforce the general expectation of confidentiality regarding the discussions relating to the proposed changes.

29. However, the Commissioner is more disposed towards the complainant's argument that Defra has failed to identify the specific harm that could occur through disclosure; with this identification crucial if the public interest arguments in favour of maintaining the exemption are to have any weight. On this point the complainant has referred to the decision of the Information Tribunal in *Department for Education & Skills v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007)[6] which endorsed the view that a public authority should *"adopt a commonsense approach to the disclosure of information, which will cause no or no significant damage to the public interest"* (paragraph 53). This corresponds with the Commissioner's guidance, cited above, which says that consideration must be given to the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.

30. Defra has argued in this case that disclosure of the withheld information may prejudice future decisions affecting the policy on dog breeding. The Commissioner considers that caution should always be exercised where there is a real risk that the release of information could impair or otherwise damage important deliberations on government policy-making. Where this does apply, the Commissioner considers the public interest arguments for disclosure must be compelling if an intrusion into the safe space is to be supported.

[6] http://www.informationtribunal.gov.uk/DBFiles/Decision/i70/DFES.pdf

31. However, having had sight of the withheld information, the Commissioner is unable to make a link between the content of the document in question and the harm described. Nor, in the Commissioner's view, has Defra itself made this link. Ultimately, no specific evidence has been provided that demonstrates how the release of a note produced at an early stage of the policy formulation process could prejudice future decisions affecting the policy on dog breeding.

32. In making this finding, the Commissioner doubts whether the information itself would add anything especially meaningful to the public debate on the issues, particularly in light of the concerns that have already been raised by various interested parties. Nevertheless, the Commissioner considers that the emphasis of FOIA is on transparency. For this reason the Commissioner has decided that in all the circumstances the balance of the public interest favours disclosure.

Right of appeal

33. 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,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.

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

Signed .....

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