

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 11 September 2008

Public Authority: Department for Environment, Food and Rural Affairs (DEFRA)
Address: Nobel House
Service Standards Unit, Room 540
17 Smith Square
London
SW1P 3JR

Summary Decision

The complainant requested information from the public authority relating to the number of notifications of replacement cattle ear tags received, broken down by manufacturer. The public authority provided some information but refused to release any information broken down to individual manufacturer level, citing the exemption at section 43 of the Act. During the course of the Commissioner's investigation, the public authority further cited the exemption at section 41 of the Act. The Commissioner's decision is that the public authority breached section 1 of the Act by inappropriately citing the exemptions at section 43 and 41. Accordingly, the Commissioner requires the public authority to disclose the information requested. In addition, the Commissioner considers that the authority breached the requirements of section 17 of the Act.

The Commissioner's Role

1. The Commissioner's role 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.

The Request

2. On 5 October 2006 the complainant requested the following information from the Rural Payments Agency (RPA):

"To ask the British Cattle Movement Service to disclose the number of notifications it has received of replacement cattle ear tags annually over the last five years and if possible to also state the figures by ear tag manufacturer."

3. On 18 October 2006 the RPA replied, stating that it does not hold the information requested. The RPA suggested that the complainant should contact the public authority, which does hold the information. Later that day the complainant made an identical request to the public authority.
4. On 1 November 2006 the public authority responded, providing the total number of replacement tags ordered from 1 January 2001 to 24 October 2006, broken down into primary replacement tags and secondary replacement tags (all cattle must have both primary and secondary tags attached). The public authority further stated that:

“I am afraid that I cannot break this information down to individual eartag suppliers as this information is commercially sensitive, which in accordance with section 43 of the Freedom of Information Act is exempt from the disclosure provisions.”
5. There was no mention of the public interest test in relation to the section 43 exemption.
6. On 1 November 2006 the complainant requested an internal review of the decision to withhold the information relating to individual manufacturers. The complainant argued that there is a strong public interest in the information because the cost to the farming industry is so high and there is a suspicion among farmers that tags made by certain manufacturers are deficient. The complainant argued that a breakdown of the figures would better inform the industry.
7. The outcome of the public authority's review was communicated to the complainant on 18 December 2006. The authority concluded that the exemption at section 43 of the Act was correctly applied, but apologised that the public interest arguments had not been properly explained in the refusal notice. The authority explained that, although there were public interest factors in favour of disclosure, these were outweighed by the potential commercial harm that could be done to the manufacturers from disclosure.
8. On 20 December 2006 the complainant made a complaint to the Commissioner about the way his request had been handled.

The Investigation

Scope of the case

9. On 20 December 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the significant public interest in disclosing the information requested.

Chronology of the case

10. On 8 November 2007 the Commissioner wrote to the public authority, requesting copies of the information withheld and seeking any additional information relevant to his investigation, such as evidence from the manufacturers or information about the current marketplace.
11. On 15 January 2008 the public authority responded, providing the information withheld together with further information about the method of collection and why the information is collected by the public authority.
12. On 12 February 2008 the Commissioner contacted the public authority to ask the following questions in relation to this case:
 - Do the numbers of replacement cattle ear tags bear any direct relationship to the numbers of primary and secondary tags ordered from each manufacturer? If there is any such relationship, please provide further explanation.
 - Has DEFRA consulted with the manufacturers about the disclosure of this information? If so, have any of the manufacturers actually objected to disclosure? Please provide any evidence you have received from the manufacturers.
13. The public authority responded on 30 April 2008. In this letter the authority provided the following background information, which the Commissioner believes is significant:

“European regulations in place since January 1998 require that a bovine animal keeps the same official identification number throughout its life. If the original tag is lost or damaged, any replacement one bought must therefore carry the same number, instead of just purchasing a new tag with a new number. Defra requires the manufacturers to load the tag type that they issue for both primary and secondary tags on to the Ear Tag Allocation System (ETAS) computer database when they obtain the next run of individual identity numbers for their customer. Defra also requires them to load the tag type if they are asked to produce a replacement tag for a number which has previously been issued. Farmers do not have to choose either the same tag or the same manufacturer as the original tag.

“I should explain that Defra’s policy for the supply of cattle ear tags is to encourage a variety of manufacturers to enter the market and supply a variety of different tag types. This allows farmers to choose different types of tags for different types of husbandry. There are currently 14 manufacturers and over 100 tag types available. We work with the manufacturers to ensure that they provide good guidance on application of tags. All tags used for cattle identification must be approved by Defra under the BSI’s Publicly Available Specification (PAS) 44:2002, and we have recently checked with manufacturers that no changes have been made to any of the tag designs.”
14. In terms of the first of the two questions put by the Commissioner, the public authority explained that “... it is not possible to draw a direct correlation or

relationship between numbers of primary and secondary tags ordered from each manufacturer and the number of replacements.” However, despite noting that there is no such correlation, the public authority reiterated its believe that if the figures were disclosed then this is the interpretation that would be put on them.

15. In terms of the Commissioner’s second question, the public authority explained that it had now completed its consultation with the manufacturers and provided the Commissioner with all the responses. The responses were varied, with some manufacturers content for the information to be disclosed and others opposed to any disclosure. In the light of the objections raised by some manufacturers, the public authority stated that it now wished to also rely on the exemption at section 41 of the Act.

Findings of the case

16. The system employed by the public authority to monitor the movement of cattle involves the collection of data into the ETAS database (see paragraph 13, above). There is some confusion within the industry about what information is held by the authority and for what purpose.
17. The complainant has stated that he wants the information because of his suspicion that some manufacturers are selling deficient tags. It appears from the evidence submitted by the public authority that some manufacturers also believe that the information withheld will reveal retention rates by manufacturer.
18. However, after carefully analysing the information, the Commissioner has concluded that it is not possible for the information withheld to convey any meaningful information about the performance of any individual manufacturers’ products. This is because the ETAS system does not record information on retention rates and does not contain information capable of revealing if replacement tags have been ordered from the same, or a different, manufacturer.

Analysis

19. The Commissioner has considered the public authority’s response to the complainant’s request for information.

Procedural breaches

Section 17

20. The public authority’s refusal notice of 1 November 2006 cited the exemption at section 43 of the Act to withhold the information relating to individual manufacturers. However, it did not mention the exemption at section 41 of the Act, upon which the public authority later stated its wish to rely. The refusal notice did not contain any explanation of the public interest factors considered in reaching the decision to withhold information by virtue of section 43, although

these were set out by the public authority in its explanation of the outcome of its internal review.

21. Accordingly, the Commissioner considers that the public authority's refusal notice breached the requirements of section 17(1)(b) and (c) in respect of the application of the section 41 exemption.

Exemptions

Section 43

22. Section 43(2) of the Act provides an exemption for information, the disclosure of which "would" or "would be likely to" prejudice the commercial interests of any person. In this case the public authority did not specify which of these two prejudice tests it applied in reaching its decision to cite the section 43(2) exemption. Accordingly, the Commissioner has considered whether disclosure "would be likely to" prejudice the commercial interests of the manufacturers of cattle ear tags.
23. In order for the section 43 exemption to be engaged, the Commissioner must first be satisfied that the manufacturers are undertaking a commercial activity. He must also be satisfied that the public authority has demonstrated that there is a real and significant risk of prejudice to those commercial interests, although such prejudice does not have to be more likely than not.
24. The Commissioner accepts that the manufacturers of cattle ear tags are engaging in a commercial activity by selling their products to farmers. The Commissioner is also persuaded that there is a competitive market for these products. The marketplace is regulated to the extent that the public authority must approve products before they can be sold. This has the effect of limiting the market but does not in any way make it less competitive.
25. Having established that the market is a commercial one, the Commissioner has considered whether disclosure would be likely to prejudice the manufacturers' commercial interests. In reaching his decision, the Commissioner has placed considerable weight on the opinions of the manufacturers themselves, following the consultation undertaken by the public authority.
26. The outcome of the public authority's consultation exercise was inconclusive. Nine manufacturers responded to the consultation, out of a total market of 14 firms (see paragraph 13, above). The respondents were split, with four raising no objection to disclosure and five arguing against disclosure.
27. The Commissioner notes that two main arguments were raised against disclosure. Firstly, some companies were concerned that disclosure of this information would reveal sales figures and therefore key commercial information about their businesses. Secondly, a more widespread concern was that the figures would be misinterpreted as revealing retention rates, to the detriment of the businesses. This contention is supported to some extent by the

complainant's own reasons for seeking the information (see paragraphs 6 and 9, above), and also by a number of the respondents to the consultation who had no objection to disclosure, who nonetheless pointed out that the information was misleading and would be misinterpreted by the industry.

28. In relation to the first objection, the Commissioner acknowledges that if the information requested were disclosed, any business that is engaged only in the manufacturing and selling of approved cattle ear tags will be revealing something about its business. However, he has not seen any evidence that persuades him that such revelations would lead to a significant risk of prejudice to the commercial interests of any of the manufacturers.
29. In relation to the second objection, the Commissioner understands that the system for recording the information sought is a complex and much misunderstood one. He acknowledges that, if the information was disclosed, some individuals within the industry may misunderstand or misinterpret the information. Any misinterpretation may lead to erroneous assumptions of the relative retention rates of manufacturers' products, and the Commissioner accepts that this raises a theoretical risk of prejudice to the commercial interests of some manufacturers (although other manufacturers may gain from such assumptions).
30. However, the Commissioner does not believe that the potential for misunderstanding of the information is a legitimate consideration in reaching a conclusion as to the likelihood of prejudice to commercial interests. The Commissioner does not consider that the information itself is commercially sensitive or on its own likely to prejudice the commercial interests of any of the manufacturers. If the information is likely to be misinterpreted, a public authority is of course entitled to contextualise the information, including placing any caveats about the potential for misinterpretation.
31. Accordingly, the Commissioner does not consider that the section 43(2) exemption is engaged in this case.

Section 41

32. Section 41 of the Act provides an absolute exemption for information that was obtained by the public authority from any other person and which, if it were disclosed, would constitute a breach of confidence actionable by that or any other person.
33. In this case it is clear that the information requested was obtained by the authority from another person, as it was provided by the manufacturers themselves through the ETAS system. The Commissioner has therefore gone on to consider whether disclosure would constitute an actionable breach of confidence.
34. The Commissioner considers that, in order to engage the section 41 exemption in respect of commercial information, a public authority should demonstrate the following tests (*Coco v A N Clark (Engineers) Limited [1968] FSR 415*):

- That the information has the necessary quality of confidence;
- That the information was imparted in circumstances importing an obligation of confidence; and
- That there was an unauthorised use of the information to the detriment of the confider.

35. A breach will no longer be actionable when there is a defence in the public interest.

Quality of confidence

36. The Commissioner is satisfied that the information requested in this case is not widely known and is not in itself trivial. Accordingly, he believes that it has the necessary quality of confidence.

Obligation of confidence

37. The second element of the test of confidentiality relates to how the information was imparted from the confider (the manufacturers) to the authority. An authority must demonstrate that there was either an explicit or implicit obligation of confidence.

38. As noted above, manufacturers that sell cattle ear tags are compelled to provide information to the public authority via the ETAS system. Whilst there does not appear to have been any explicit obligation of confidence, the public authority has argued that this compulsion, together with the fact that the public authority has never before made any of the information public, has created an implicit obligation of confidence.

39. The Commissioner has again placed considerable emphasis on the opinions of the manufacturers, which were not conclusive. It is clear that some believed such an obligation to exist, and others appear to have held no such belief.

40. In these circumstances, the Commissioner is not convinced that the information was imparted in circumstances that imported an obligation of confidence.

Detriment

41. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. In some cases, for example involving the personal information of individuals acting in their private capacities, there is no need to prove the element of detriment. Indeed the Information Tribunal has taken the view (such as in *Bluck v the Information Commissioner & Epsom & St Hellier University NHS Trust – EA/2006/0090*) that the loss of privacy is a sufficient detriment in itself.

42. However, in this case the information requested is not personal but commercial data. Where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental

impact to the commercial interests of the confider for the section 41 exemption to be engaged.

43. The Commissioner considers the test of detriment under section 41 as it relates to commercial information is analogous to the test of prejudice under section 43 of the Act. For the reasons set out in paragraphs 22 to 31 (above) in relation to section 43, the Commissioner considers the arguments relating to detriment to be finely balanced. He notes that manufacturers have responded very differently to the possibility of disclosure.
44. However, the Commissioner is not persuaded that the disclosure of the information requested in this case would be detrimental to the confiders. Accordingly, he does not believe that disclosure of the information requested would constitute an actionable breach of confidence and therefore the section 41 exemption is not engaged in this case.

The Decision

45. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the following provisions of the Act:
- Section 1(1)(b), by inappropriately citing the exemptions at sections 43 and 41 of the Act;
 - Section 17(1)(b), by not citing the exemption at section 41 in its refusal notice and outcome of internal review;
 - Section 17(1)(b), by not specifying subsection (2) of section 43; and
 - Section 17(1)(c), by not specifying why the section 41 exemption applies.

Steps Required

46. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Provide the information requested on 18 October 2006 to the complainant
47. The public authority must take the steps required by this notice within 35 calendar days from the date of this notice.
48. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of Appeal

49. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 11th day of September 2008

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

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.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) 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.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”