

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 March 2024

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

**Address:** Seacole Building  
4th Floor  
2 Marsham Street  
London  
SW1P 4DF

### Decision (including any steps ordered)

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1. The complainant has requested from the Department for Environment, Food & Rural Affairs (Defra) information relating to ecollars<sup>1</sup> within a certain timeframe. Defra provided some information but refused other information under sections 35(1)(a) (formulation and development of government policy), 21 (information accessible to the applicant by other means) and 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that section 35(1)(a) of FOIA is engaged and that the public interest favours non-disclosure of the information.
3. The Commissioner does not require further steps.

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<sup>1</sup> A dog or cat training collar that delivers an electric shock to the neck.

## Request and response

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4. On 9 August 2023 the complainant wrote to Defra and requested information in the following terms -

“Could I please be sent externally received or internal communications from anyone at DEFRA in relation to ecollars from 01/09/2017 to 31/08/2018. Could I also be sent any meeting packs, minutes and actions for the same time period regarding the ecollars. Lastly, could I be sent any draft and official communications released regarding the ecollars for the same time period.

You can omit information that falls within the scope of my request but would add nothing to my understanding of the matter, e.g. housekeeping emails, such as meeting requests and acknowledgements; draft documents, where the finalised document also falls within the scope of the request.

The information I would like is centred around how the decision was made that a ban on ecollars was the correct decision for DEFRA to take before the publication made on 27th August 2018.”

5. Defra responded on 29 August 2023 and provided links to information in the public domain - a press release, the public consultation outcome and summary of responses, citing section 21 of the FOIA. It attached its responses to 12 previous FOI requests and provided some information relevant to the request by way of advice and assistance. Some information was withheld under section 35(1)(a) (formulation and development of government policy) and section 40(2) (personal information). The withheld information was described as – “(email chains, minutes from two meetings and three draft replies to external correspondence)”.
6. On 1 September 2023 the complainant requested an internal review arguing that the request was about “how the decision was made that a ban on ecollars was the correct decision” and “not about how the government should formulate or develop that ban to make it policy”. The complainant also stated that they were content for staff names and job titles to be withheld.
7. Defra provided an internal review on 30 October 2023 that maintained its position as regards section 35(1)(a) of FOIA but made no mention of section 40(2) because the complainant had agreed that certain personal information did not need to be provided. Defra acknowledged that it had provided a late review (more than forty working days) that was not in

line with the section 45 Code of Practice. Defra also conducted a fresh search for any information falling within scope but no further information was located.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 28 October 2023 to complain about the way their request for information had been handled. Initially the complaint was about the lack of an internal review but later about the citing of section 35 when the complainant had asked about how a decision had been made.
9. The Commissioner considers that the scope of his investigation is to look at whether Defra is entitled to rely on section 35(1)(a) of FOIA and whether, on the balance of probability, there is any further information held.

## **Reasons for decision**

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### **Section 1 – general right of access to information held by public authorities**

10. Section 1(1) of FOIA states 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.”

11. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided). The Commissioner is not expected to prove categorically whether the information is held.
12. Defra explained that “relevant electronic SharePoint files were searched using the terms... e-collar, e collar, electronic collar and shock collar” as there are no paper records. These were filtered by the date parameters

of the request. It explained that this “would identify any document held which relates to the broader subject of ecollars”. After this “it was possible to narrow down manually to files which addressed internal and external communications within the date ranges specified in the request”. The officials who created or are named in the documents and “still work in the directorate” and have access to “retained emails, were asked to search their own mailboxes”. The Communications team were also asked to search their records.

13. Minutes and drafts are held on SharePoint and other communications held in staff Outlook accounts. Defra explained that its “officials are expected to store records using the networked resources” and it is “not aware of local files being saved or retained on personal computers”. If any Defra member of staff has left and held relevant emails these would have been deleted when their email accounts were “eliminated”.
14. Some information (12 FOI responses falling within scope) that was released in its response to the FOI request has “since been destroyed in line with Defra’s disposal policy”. However, Defra “does not have a record of deletion of electronic records. When an electronic record is deleted, it is transferred to a “recycle bin” for 90 days and subsequently permanently deleted. There is no business purpose or statutory requirements to continue to hold the requested information. Defra emphasises that, “It is Defra policy that all business records are kept within ‘Sharepoint Online’. Therefore, copies of records should not be held in any other locations”.
15. On the civil standard of the balance of probability, the Commissioner accepts that Defra does not hold any further information that it hasn’t either provided or withheld under cited exemptions.

### **Section 35 – The formulation and development of government policy**

16. Section 35 sets out four separate classes of information, each relating to a different activity. Defra cited -

“(a) the formulation or development of government policy,”

It is a class based exemption, the information just needs to fall within the class of information, its sensitivity doesn’t have to be considered.

17. FOIA does not define ‘government policy’:

‘Section 35(5) states that it includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Government, but does not provide any further guidance.

The Commissioner's guidance<sup>2</sup> refers to "a useful description of policymaking" from The Modernising Government White Paper (March 1999) as -

"the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world".

In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives.'

18. The 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
19. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
20. In order to be exempt the information has to -

"relate to the formulation or development of government policy. These terms broadly refer to the design of new policy, and the process of reviewing or improving existing policy".

The Commissioner's guidance stresses that it is "important to identify where policy formulation or development ends and implementation begins". However "policy design and implementation are not always entirely separate. They are becoming increasingly integrated, and many implementation issues also relate to policy formulation".

### **The complainant's view**

21. The complainant questions Defra's citing of section 35 because they do not accept that their request fell under the formulation and development of this policy:

"My request was in regards to how the decision was made that a ban

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<sup>2</sup> [Section 35 - Government policy | ICO](#)

on e-collars was the correct decision. It was not about how the government should formulate or develop that ban to make it policy."

### **Defra's view**

22. The term 'relates to' means that "any significant link between the information and the activity is enough. It can - "relate to' the activity due to its original purpose when created, or its later use, or its subject matter". Defra explained that -

"this information relates to the Government position on how the use of hand-held collars which deliver an electric shock to dogs and cats (also known as e-collars or electric shock collar) should be regulated and/or restricted in England".

It states that:

"Development of the policy was ongoing in the specified September 2017-2018 period as policy options were in the process of being prepared and were in the process of being prepared and were put to Ministers in February 2018."

Subsequently, Defra "conducted a 'write round' by which the views of officials from across government were sought and taken into account in developing the policy". In March and April 2018 there was formal consultation on the policy. In its internal review Defra said that,

"Academic research, public consultation responses, and direct engagement with the animal welfare sector, with training organisations and with other stakeholders led the Government to conclude that the use of these electric shock collars should be prohibited."

23. The implementation of the policy was held back due to judicial review and because of the COVID-19 pandemic:

"Defra introduced draft regulations implementing the policy in 2023, however these were not considered by both Houses of Parliament and the policy is under Ministerial consideration as of February 2024."

24. It contends that the development of the policy is "ongoing as decisions relating to the regulation of the use of e-collars continue to be put to

Ministers". Defra explained that legislation<sup>3</sup> to implement this policy was progressing through parliament at the time of the request. However, the "legislation was not approved by both Houses of Parliament before its specified coming into force date". Ministers are considering options on how to deliver the policy.

### **The Commissioner's view**

25. Although the Commissioner understands the complainant's position, how a decision is made in a government department is a process of consultation eventually leading to the formulation and development of a policy.
26. The Commissioner's guidance states that it is "important to identify where policy formulation or development ends and implementation begins". Policy is made in various ways and "it is not always easy to identify exactly when a policy is finalised (ie when formulation ends and implementation begins)". The formulation of policy can continue all the way up to the point the bill finally receives royal assent and becomes legislation". As mentioned earlier, it is not always easy to separate policy design and implementation as they are increasingly integrated. Implementation issues (such as risks) may be a factor when assessing policy options. After a decision has been made issues can arise which "may then feedback into a policy improvement process" or details adapted during implementation. Each case needs to be considered on its facts as to what is actual policy development, rather than fine-tuning.
27. It is the Commissioner's understanding that the Animal Welfare (Electronic Collars) (England) Regulations 2023 is not yet made as a UK statutory instrument. In this instance Defra has explained why this policy is still under development, despite dating back several years. The Commissioner's satisfied that this information relates to the development of government policy on ecollars and that section 35(1)(a) of FOIA has been correctly cited.

### **Public interest test**

28. As the exemption is engaged, the Commissioner will go on to consider whether the public interest lies in disclosure or non-disclosure.

### **Public interest factors in favour of disclosing the requested information**

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<sup>3</sup> Draft Animal Welfare (Electronic Collars) (England) Regulations 2023

29. The complainant states that they “would like DEFRA to be open and transparent about how a ban on ecollars was determined as the best course of action”. Refusing to do so “could be a blanket used to cover all their work”. The complainant “want[s] to know how a decision was made that a ban was the most suitable course of action that then required the government to formulate a policy”.
30. Defra said that it recognised “the importance of facilitating reasonable scrutiny by the general public, of the evidence base supporting development of the policy”. It explained that -

“elements of the policy formulation were subject to detailed scrutiny during judicial review proceedings on policy development during an overlapping period (The Electronic Collars Manufacturers Association and Petsafe Ltd v the Secretary of State for Environment, Food and Rural Affairs)...”

Therefore Defra “took care not to unreasonably withhold information that had already been discussed in a public forum (Court)” and what information was in the public domain.

### **Public interest factors in favour of maintaining the exemption**

31. Defra argues that “when the original request was made, the policy had yet to be implemented and was in the process of being approved and debated in the Houses of Parliament”. It describes the “matter” as “contentious and divisive” with “vocal public campaigns both in favour of and opposed to this policy”.
32. This policy area has come under “active consideration again as the legislation required to implement the policy was not approved by Parliament ahead of the specified coming into force date”.
33. Defra contends that it has already provided a large amount of information “proactively” in its consultation summary and “reactively” to the complainant. It suggests that it “attained the appropriate balance between providing assurance that the government gave fair consideration to a range of views...” whilst “upholding the principle that policy officials, stakeholders and Ministers must be free to have internal discussions with a reasonable expectation of confidentiality on live policy issues”.
34. Defra provided further argument to the Commissioner that cannot be reproduced here for reasons of confidentiality.

### **The balance of public interest**



35. The Commissioner accepts that there is interest amongst the public in this subject as many people have dogs and cats and will have views for and against the use of ecollars. However, Defra has put information into the public domain and provided information to the complainant that the Commissioner considers satisfies the public interest in this matter. The release of the withheld information would not add to the public's understanding whilst it could undermine the policy process, in this case internal discussions and those with external stakeholders whilst the policy is still under consideration.

### **Other matters**

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36. The section 45 code of practice<sup>4</sup> recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from the receipt.

37. In this case Defra acknowledged that it did not provide an internal review within the recommended maximum timeframe.

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<sup>4</sup> [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

## **Right of appeal**

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38. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Wilmslow**  
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