

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2012

Public Authority: Department for Environment Food and Rural Affairs ("Defra")

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant requested copies of inspection reports in relation to two circuses. The reports concerned the welfare practices of the circuses regarding animals in their care. Defra refused the request under sections 38 (health and safety) and 41 (information provided in confidence) of FOIA. The Commissioner's decision is that Defra has correctly applied section 41 to the report concerning Peter Jolly's Circus but that it incorrectly applied sections 38 and 41 to the two reports concerning the Great British Circus.
2. The Commissioner requires Defra to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the two reports regarding the inspections of the Great British Circus carried out in 2008.
3. 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

4. On 2 June 2011, the complainant wrote to Defra and requested the following information:

- 1. a copy of the report of Defra's veterinary service on the inspection of Great British Circus carried out in 2009;*
 - 2. a copy of Defra's inspection of the winter quarters of the Great British Circus carried out on 24/01/2008;*
 - 3. a copy of the report of Defra's inspection of the Great British Circus during tour carried out on 08/2008; and*
 - 4. a copy of the report of Defra's inspection of the Peter Jolly's during tour carried out on 31/07/2008.*
5. Defra responded on 19 July 2011. The requested information was withheld under sections 38 and 41 of FOIA.
 6. An internal review was requested on 25 August 2011. The outcome of the internal review, which was sent to the complainant on 25 October 2011, upheld Defra's decision to withhold the requested information under sections 38 and 41.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way the request for information had been handled, in particular that the requested information had not been disclosed.
8. Following clarification provided by Defra, the complainant accepted that it did not hold any reports for the Great British Circus for 2009. The scope of the complaint was therefore limited to whether Defra was entitled to withhold the three reports related to inspections in 2008 under sections 38 and 41 of FOIA.

Reasons for decision

Section 41 – Information provided in confidence

9. Section 41 of FOIA provides:

"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."

(a) Was the withheld information obtained by Defra from another person?

10. The circus reports requested by the complainant were prepared by two veterinary surgeons ("vets") at the request of Defra. They detailed inspections carried out by the vets to assess the welfare practices of the circuses in relation to the wild animals that they held. The two vets were not employees of Defra. The Commissioner has therefore concluded that the information contained in the withheld reports was obtained by Defra from another person for the purposes of section 41. He went on to consider whether disclosure would constitute an actionable breach of confidence.

(b) Would disclosure of the withheld information constitute an actionable breach of confidence?

11. In order to determine whether disclosure would constitute an actionable breach of confidence the Commissioner considered the following questions:

(i) Does the withheld information possess the necessary quality of confidence?

(ii) Was the withheld information imparted in circumstances importing an obligation of confidence?

(iii) Would unauthorised disclosure cause a detriment to the party providing the information or to another party?

(iv) If parts (i)-(iii) are satisfied, would the public authority nevertheless have a defence to a claim for breach of confidence based on the public interest in the disclosure of the withheld information?

(i) Does the withheld information possess the necessary quality of confidence?

12. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. Having reviewed the withheld information, the Commissioner is satisfied that it is clearly more than trivial in nature.
13. With regard to the issue of whether it is otherwise accessible, he is satisfied that the information contained in the report on Peter Jolly's Circus is not otherwise accessible. In relation to the two reports on the

Great British Circus, he is satisfied that the majority of the information contained in those reports is not otherwise accessible. However, he notes that the circus owner has published some extracts from the reports. As a result Defra has accepted that the information contained in these published extracts is no longer subject to a duty of confidence.

(ii) Was the withheld information imparted in circumstances importing an obligation of confidence?

14. Defra informed the Commissioner that assurances of confidentiality were not given to the circuses and vets in writing. However, it explained that the circuses made clear their expectation of confidentiality in return for their cooperation with the inspections and that they only consented to the inspections on that basis. This was agreed to by Defra's policy officials and the vets prior to the inspections taking place. The vets also participated on the same understanding.
15. The Commissioner accepts that the circus owners and the vets would have had a reasonable expectation that Defra would keep the reports confidential. He is therefore satisfied that the withheld information was imparted in circumstances that created an obligation of confidence.

(iii) Would unauthorised disclosure cause a detriment to any party?

16. Defra informed the Commissioner that in recent years there had been numerous instances of protest activities and vandalism carried out at circus sites on the basis of alleged or suspected wrongdoing towards animals by circus owners or employees (whether animal cruelty, neglect, or inappropriate use in performances). Threats of personal harm or death have been reported by circus proprietors and by veterinary staff working with circuses on behalf of Defra. These threats came in the form of unrecorded telephone calls or anonymous messages on animal extremist websites, and while they may be designed to scare rather than signal an actual intent, the risk of harm which they represented could not be in any doubt, and the detrimental effect they had on the mental wellbeing of their recipient or target was real.
17. Defra explained that, while the reports as a whole present the animal welfare activities of the circuses in a good light, they did identify areas for improvement. It believed that, if this information were to be released, it would be used by anti-circus extremists to legitimise, and perhaps inspire an increase in their harmful activities towards circuses. Without further qualification or explanation (for example details of subsequent improvements made by the circuses on the basis of the reports) the comments on areas for improvement would undoubtedly be received by anti-circus extremists as inflammatory, with consequences

potentially dangerous to circus owners, their employees, or others visiting for veterinary purposes.

18. The Commissioner is of the view that the disclosure of the reports has the potential to cause detriment to the circus owners and those associated with the circuses. It also has the potential to cause detriment to the two vets who carried out the inspections. This detriment may simply take the form, for example, of adverse public comment which could impact on their businesses. As a result he accepts that a duty of confidence is owed by Defra to the circus owners and the two vets in respect of the information contained in the reports.

(iv) Is there a public interest defence to the disclosure of the information?

19. Section 41 is an absolute exemption and therefore there is no public interest test to be applied under FOIA. However, under the common law, a duty of confidence can be overridden if the public interest in disclosure outweighs the public interest in maintaining the duty of confidence. The Commissioner has therefore considered the public interest arguments in favour of maintaining the duty of confidence and the public interest arguments in favour of disclosure.

Public interest arguments in favour of maintaining the duty of confidence

20. In considering the arguments in favour of upholding the obligation of confidence, the Commissioner has given weight to the public interest in preserving the principle of confidentiality. He acknowledges that the consequence of the disclosure of any confidential information can be, to some degree, to undermine the principle of confidentiality which concerns the relationship of trust between confider and confidant. People could be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.
21. In relation to the specific information that was requested, Defra informed the Commissioner that the regulation of live animals in circuses is not currently achieved through a compulsory licensing system but through a system of voluntary inspections. If the reports were to be disclosed, there was a possibility that circus owners would not agree to cooperate with Defra in future in allowing the inspection of the animals in their care. It believed that it was in the public interest that circus owners, vets and Defra should be able to continue to cooperate with one another to ensure that high standards of animal welfare were maintained.

22. The Commissioner acknowledges Defra's concerns that disclosure of the withheld information would be likely to increase the threat to the health and safety of those associated with the circuses from some of the more extreme elements amongst animal rights campaigners.
23. Defra also explained that, in its view, withholding the requested information avoided the risk of anti-circus disturbances and "witch hunts" which might be inspired by the disclosure of the information in the reports.
24. The Commissioner believes that there is a strong public interest in protecting the health and safety of people when engaged in lawful business activities, such as the running of circuses. However, he notes that a significant amount of information in the reports is background information about the types of animals kept, issues related to record keeping, staff training and conservation and education. Only parts of the reports relate directly to the actual care of the circus animals.
25. The Commissioner also notes Defra's comments that the reports as a whole present the animal welfare activities of the circuses in a good light. They do identify some areas for improvement; however, overall the reports do not appear to be particularly critical of the way in which the circuses look after the animals in their care. They appear to present a balanced view of the issues related to the care of the animals. Having reviewed the contents of the reports, the Commissioner is not convinced that disclosure would be likely to increase the risks to the health and safety of those involved in running the two circuses concerned or the vets who carried out the inspections.
26. In addition, Defra pointed out that the reports related to inspections carried out in 2008. In its view, the information in the reports would have been of significant interest to the general public in 2008, providing as it did a picture of animal welfare conditions in travelling circuses at that time. However, by the time of the request the information was out of date, with the circuses having made improvements to bring them closer in line to the inspectors' expectations. The release of the reports would not therefore satisfy the public interest in finding out about current practices in circuses.
27. The Commissioner notes that the reports could still be regarded as of interest at the time that the request was made in June 2011. This is particularly the case, in light of the lack of availability to the public of more contemporaneous independent reports on the welfare of the animals in the care of the two circuses.

Public interest arguments in favour of disclosure

28. The Commissioner considers that the disclosure of the reports would lead to greater openness and transparency in relation to the care of animals by the circuses. Disclosure would allow the public to gain further understanding of the standards of care that have been in operation in the circuses in question. This would increase the public's understanding and knowledge in this area and so assist the debate in a controversial area.
29. Aside from the more general public interest arguments in favour of disclosure, in relation to the Great British Circus, the Commissioner notes that on page 19 of its souvenir programme and magazine for 2009 it published eight extracts from the two reports. These extracts highlight favourable aspects of the reports in terms of its care of its animals. They have been published as a means of promoting the circus, particularly with regard to the welfare of the animals that it keeps. On the same page of the programme there is a statement from the circus that *"...we have a policy of absolute transparency when it comes to the way that we care for our animals."*
30. Defra, understandably, acknowledges that these published extracts from the reports can no longer be regarded as subject to a duty of confidence. However, this inevitably raises the issue as to whether it is in the public interest for the whole of the two reports in relation to the Great British Circus to be published to ensure a fair, accurate and balanced account of the inspectors' findings with regard to the welfare of the animals held by the circus as opposed to the selective disclosure by the circus of aspects of the reports which are more favourable to it. In such circumstances, Commissioner perceives that there is a very strong public interest in the disclosure of the reports in full to avoid suggestions of misrepresentation of their overall content and to ensure that the public is able to form a balanced view of the outcome of the inspections.

Balance of the public interest arguments

31. In light of the significant public interest in ensuring a balanced public view of the outcome of the inspection of the Great British Circus, the Commissioner has concluded that Defra would have a defence to a claim for breach of confidence if the reports were disclosed. He regards the fact that the proprietors of the circus have published the positive aspects of the report and espoused a policy of "absolute transparency" as very important in that regard. Consequently he has determined that section 41 is not applicable to the two reports concerning the Great British Circus. He has, however, gone on to consider whether these two reports are exempt from disclosure under section 38.

32. In relation to Peter Jolly's Circus, the Commissioner is not aware of any evidence of it publishing any extracts from its inspection report. The Commissioner notes the public interest arguments in favour of disclosure but he is not convinced that these outweigh the public interest in preserving the duty of confidence that exists. He is therefore not satisfied there is a sufficient public interest in disclosure to provide a defence to an action for breach of confidence. He has consequently determined that Defra was entitled to withhold this report under section 41.

Section 38 – Endangering health and safety

33. The Commissioner considered whether the two inspection reports in relation to the Great British Circus, which were not exempt under section 41, were exempt from disclosure under section 38.

34. Section 38(1) provides that:

"Information is exempt information if its disclosure under this Act, would or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual."

35. The Commissioner considers that the term "endanger" under section 38 should be interpreted in the same way as the term "prejudice" in other FOIA exemptions. Therefore, in order to engage this exemption, the public authority must demonstrate that disclosure of the information in question would or would be likely to have a detrimental effect upon the physical or mental health of any individual, or the safety of any individual, that is more than trivial or insignificant.
36. Defra confirmed that it was relying on the lower threshold contained in the exemption, that disclosure 'would be likely to' endanger the safety of those involved with the circuses and the vets who carry out the inspections, rather than that it 'would' endanger them.
37. In determining the possible application of the exemption the Commissioner initially considered whether the potential prejudice argued by Defra relates to the interest identified in this exemption, that is, if the prejudice were to occur, would this prejudice relate to the safety of individuals.
38. Having considered the Defra's arguments regarding the effects that disclosure might have on the health and safety of those involved with the circuses, as set out in paragraphs 16-17 above, the Commissioner is

satisfied that the potential prejudicial effects do relate to the safety of individuals.

39. In addition, in light of the above arguments, the Commissioner is satisfied that there is a causal relationship between the potential disclosure of the withheld information and endangerment to the safety of individuals. Furthermore, he is satisfied that the resultant endangerment would (if it were to occur) be real and of substance.
40. The Commissioner then considered whether the disclosure of the withheld information would be likely to endanger the safety of individuals. In reaching a decision on the question of the likelihood of prejudice, the Commissioner considers that the expression 'likely to prejudice' means that the chance of prejudice being suffered should be more than a hypothetical possibility. There must be a real and significant risk.
41. As the Commissioner noted in relation to section 41, only parts of the two reports relate specifically to the actual care of the animals kept by the circus. There is a significant amount of information concerning the types of animals kept, record keeping, staff training and conservation and education.
42. In addition, Defra comment on how the reports as a whole present the animal welfare activities of the circus in a good light whilst, at the same time, identifying some areas for improvement. The reports appear to the Commissioner to present a balanced view of the issues related to the care of the animals kept by the circus. After reviewing the content of the two reports, he is not convinced that disclosure would be likely to inspire an increase in activity by anti-circus extremists as argued by Defra. The Commissioner does not therefore accept that disclosure would be likely to endanger the health and safety of those involved in running the circus or the vets who carried out the inspections. He has consequently determined that section 38 is not engaged and that the two reports should be disclosed.

Procedural requirements

43. Section 17(1) of FOIA requires a public authority to issue a refusal notice within 20 working days of the receipt of a request. The request was submitted by the complainant on 2 June 2011. Defra issued a refusal notice in respect of all of the information that it was seeking to withhold under Part II of FOIA on 19 July 2011, more than 20 working days after receipt of the request. It therefore breached section 17(1).

Other matters

44. The Commissioner notes Defra's concerns about the impact that disclosure of the inspectors' comments on areas for improvement identified in the reports might have without further qualification or explanation. Given these concerns, Defra could, if it wished to do so, accompany the release of the reports with an explanation to provide some context to them. This could include details of changes that have been introduced by the circus over the period of time since the inspections were completed.

Right of appeal

45. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF