

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2018

Public Authority: Department for Environment, Food & Rural Affairs (DEFRA)

Address: Area 4b
Nobel House
17 Smith Square
London SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information about DEFRA's awareness of the requirements in other EU member states regarding the trade in captive-bred, wild birds.
2. The Commissioner has determined that DEFRA does not hold any information relevant to parts (1) and (2) of the request as numbered in this notice. However, the Commissioner's decision is that DEFRA has incorrectly applied the exemption at section 21 of the FOIA to part (3) of this request.
3. The Commissioner requires DEFRA to issue a fresh response to the complainant with regard to part (3) which does not rely on section 21.
4. 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

5. On 1 November 2016, the complainant requested information from DEFRA in the following terms via the website What Do They Know:

"The European commission wrote to the UK Government on the 14th October 2011 with regards documentary evidence not being required in other EU countries for both schedule birds under the wildlife and countryside act 1981, The Wildlife and Countryside (Ringing of Certain Birds) Regulations 1982 (the 1982 Regulations) the UK government responded saying: 'Further my authorities in England acknowledge that such documentary evidence is not required in other Member States from which birds are commonly imported into the UK, and that therefore such records are not routinely kept.' I am assuming DEFRA is one of the authorities the UK government makes reference to. Please can I ask that DEFRA supply me the following information under the FOI act?

When did DEFRA find out that documentary evidence was not a requirement for both schedule birds in other EU countries?

Can I have all the information requested and received for this information to supplied to DEFRA?

Can you also tell me when and who first highlighted that documentary evidence was not a requirement in other EU countries?"

6. DEFRA responded on 3 January 2017. It stated that it required some clarification of the request, as follows:

"... it is clear that we will not be able to answer your request without further clarification. We therefore require you to provide further information to enable us to identify and locate the information that you have requested. In particular, it would be useful to know precisely which schedules you are referring to in your request and the relevant legislation. We have to know this in order to know what information to look for. You ask "Can I have all the information requested and received for this information supplied to DEFRA?" Can you be more precise what type of information you are referring to? What is the information that has been supplied to Defra that you wish to know about?"

7. The complainant clarified as follows, on 6 January 2017:

"Schedule 3 part 1 of the countryside act 1981 and birds covered by GL-18 (non Schedule) see link [link provided]. The information I am requesting is 'When did DEFRA find out that documentary evidence of captive breeding was not a requirement for both Schedule 3 part 1 of the countryside act 1981 and birds covered by GL-18 (non Schedule) see link [link provided] in other EU countries? Can I have all the

information DEFRA requested and received that documentary evidence of captive breeding was not a legal requirement and routinely kept in other EU Countries for the above schedules bird for them to respond to the letter from the European commission of 14th October 2011 under PILOT 2583/11/ENTR - RESTRICTION OF FREE MOVEMENT OF GOODS BY THE UK AND NATURAL ENGLAND? Can you also tell me when and who first highlighted to DEFRA that documentary evidence of captive breeding was not a requirement in other EU countries for both the above schedule birds?"

8. DEFRA issued a response on 17 February 2017 and stated that it held information comprising "*a formal assessment of the marking and other requirements in other EU Member States... carried out by DEFRA*" but that this was exempt from disclosure under section 21 of the FOIA – information accessible by other means – since DEFRA had already provided the complainant with everything it held with regard to this during 2013.
9. DEFRA also commented that it did not consider that all of the request was a valid request for information under the legislation, but commented that it had "*no record of when and who first registered with the Department concerns about documentary evidence of captive breeding requirements in other EU countries, and there is no Defra record of what the documentary evidence requirements are in all EU member states.*"
10. The complainant requested an internal review on 9 March 2017. DEFRA did not carry out an internal review.

Scope of the case

11. The complainant contacted the Commissioner on 7 December 2016 to complain about the way his request for information had been handled. At this stage, he was awaiting an initial response to his request, regarding which DEFRA subsequently requested clarification.
12. Following DEFRA's response to the request on 17 February 2017, the Commissioner advised the complainant that he could request an internal review. DEFRA did not respond to the request for internal review, despite reminders being sent by the ICO; the Commissioner then accepted the case for investigation, and wrote a letter of investigation to DEFRA on 4 July 2017.

The correct legislation

13. The Commissioner has considered whether the request was responded to under the correct legislation. In view of the fact that the information,

if held, would relate to the trade in captive-bred wild birds, she gave consideration to whether it should have been handled under the Environmental Information Regulations 2004.

14. The Commissioner considers that the information, if held by DEFRA, would be a record of what is required in other countries to prove that a bird is not wild. Although this is relevant to the protection of the natural environment, the information itself is specific to captive-bred birds.
15. Having considered her guidance on what constitutes environmental information¹, therefore, she is satisfied that due to the specific requests under consideration in this notice, DEFRA correctly responded under the FOIA.

Clarifying the request

16. For ease of reference, the Commissioner, as agreed with the parties, notes that there are three distinct parts to the request, which she now numbers for clarity as follows:

(1) When DEFRA was made aware that documentary evidence of captive breeding was not required in other EU member states, and that records were not routinely kept by them.

(2) Who first informed DEFRA that documentary evidence of captive breeding was not required in other EU member states.

(3) All the information DEFRA requested and received regarding documentary evidence of captive breeding not being a legal requirement nor routinely kept in other EU Countries for the specified birds, in order for them to respond to the letter from the European commission.

The relevant exemptions

17. The Commissioner considers that the scope of the investigation has been to determine whether DEFRA has correctly stated that no information is held falling within the scope of parts 1) and 2) of the request, and whether it has correctly applied section 21 of the FOIA to part 3) of the request.
18. She will also consider whether DEFRA has complied with section 10 of the FOIA – time for compliance.

¹ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

Reasons for decision

19. By way of background, the complainant was seeking information which relates to UK laws on the registering and/or ringing of captive-bred 'wild' birds; specifically, those birds listed in Part I of Schedule 3 of the Wildlife and Countryside Act 1981, and those which may be licensed for sale under a government 'GL-18' licence. The Commissioner understands that UK laws seek to ensure that any 'wild' birds sold under the legislation have been bred in captivity.
20. It is evident that the request followed on from the complainant becoming aware of a letter which was sent by the UK government to the European Commission in 2011. The letter, which was made available to the complainant, explained that the UK government was undertaking a broad review of *"the existing arrangements for ringing captive-bred birds"* and acknowledged that *"the current regulatory regime has introduced additional requirements for the legitimisation of the trade in captive-bred birds where those birds can otherwise be traded in other Member States."* The complainant noted also that the letter stated:
- "My authorities in England however acknowledge that, in order for... a licence to be granted, the licensing authority would be likely to request documentary evidence of captive-bred status before granting such a licence... such documentary evidence is not required in other Member States from which birds are commonly imported into the UK, and that therefore such records are not routinely kept.... My authorities in England again accept that, in other Member States from which birds are commonly imported into the UK, such documentary evidence of captive-bred status is not required for the purpose of trading captive birds, and in such countries a ring may suffice as proof of captive breeding."*
21. She will consider parts (1) and (2) of the request together and then consider part (3).

Parts (1) and (2) of the request

Section 1 – information held/not held

22. Section 1 of the FOIA states that:

"(1) 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."

23. DEFRA has explained to the Commissioner that it does not hold information falling within the scope of parts (1) and (2) of the request. That is, it does not have a record of a date when it became aware of the requirements (or otherwise) in other EU member states; neither does it have a record of who first informed it of these requirements.
24. DEFRA explained: *"A search of our records has not located the date that the UK became aware or who notified us. I understand that there was no business need to record the date we became aware of legislative differences across member states of the European Union as part of the official record."*
25. The Commissioner returned to DEFRA to ask for a more detailed explanation of the searches that had been carried out. In view of the fact that DEFRA may have investigated the matter before the letter was written in 2011, she inquired whether emails and telephone logs had been checked which may reveal the relevant information.
26. The complainant has also stated that: *"for them to suddenly agree to this infringement after just one letter from the EC within a month seems odd when I have been saying it since 2007. I am not sure how to put this but they only had a month to look into this to allow them to respond and if this is the case I believe I am entitled to the information which led to the admission of the infringement for obvious reasons, or is it more of a case they were fully aware of this infringement well before the EC contacted them."*

27. DEFRA provided the following explanations:

"It is likely that telephone calls were made and e-mails were sent in order to inform the response to the Commission in 2011. We have made detailed and relevant searches in the three official repositories used by Defra that include:

- a) SharePoint (Defra's electronic record management system);*
- b) Relevant accredited shared drive (our official shared computer drives created by the Information Management team to hold official records) and*
- c) The previous Department's incarnation of SharePoint (pre 2015), which has been retained in a read only mode.*

We have used the relevant search tools in SharePoint and the Explorer search tool to check these official repositories. In addition a visual check has been done of the relevant repositories... The searches have shown that there was no formal record of phone calls kept or any relevant e-mails placed on the shared drive in relation to [the complainant]'s request. These are the most likely locations that such information would

have been placed as part of the official record. Only important or relevant policy e-mails and memos are routinely kept on SharePoint, and routine exchanges of e-mails are not kept. Records are removed as a matter of good information management and in line with Defra's retention policy.

In our searches we have included electronic folders in relation to Defra policy on captive bred birds. In addition, we have checked with the relevant individuals in the policy team in the Department at the time to see if they hold any information on their personal drives, but those searches have not provided anything in relation to [the complainant]'s request."

28. DEFRA explained that extensive searches had been carried out in relation to a previous request from the complainant and added that: *"The relevant... policy team have [carried out] searches of the relevant shared folders and contacted all the individuals (who remain within the department) previously concerned during [the earlier] request... there were no documents to show the position on documentary evidence in all the member states, or a singular date when we were first aware of this or who notified us of such a position."*
29. The Commissioner has asked whether any information falling within the scope of these parts of the request may have been deleted.
30. DEFRA has explained in detail its record-keeping procedures. In particular, it has provided further detail of its three information repositories described in paragraph 27 of this notice: Sharepoint, the previous incarnation of Sharepoint, and shared drives. DEFRA states that its policy is for *"all information that could form part of the record to be placed in one of these three official corporate repositories."*
31. Regarding whether any information may have been deleted, DEFRA states: *"In the accredited shared drives and SharePoint (2007 and 2013 versions), automatic deletion has not been switched on. Defra's current position is that no official electronic records post-2001 would be deleted without formal review by the Defra Records Management team. Such a review would be done by Knowledge and Information Management specialists/professional trained in digital review techniques."*
32. The complainant, however, has argued that he himself notified DEFRA in 2007 that he considered his trade in birds was being restricted due to the requirements being imposed upon him.
33. He therefore considers that DEFRA would hold information relating to parts (1) and (2) of his request and that for DEFRA to deny this is *"a lie and a cover-up."*

34. The Commissioner has considered his arguments; however, she notes that his request specifically asked for *when* and *who first* notified DEFRA about the relevant issues.
35. The Commissioner is satisfied that DEFRA has carried out adequate and appropriately targeted searches for the information requested in parts (1) and (2) of the request, and that, on the balance of probabilities, it does not hold any information falling within the specific scope of these requests.

Part (3) of the request

Section 21 – information accessible to applicant by other means

36. Section 21 of the FOIA provides an exemption to the requirement to make information accessible under section 1 of the FOIA, if it is already reasonably accessible to the applicant via other means.
37. Part (3) of the request concerns "*all the information DEFRA requested and received that documentary evidence of captive breeding was not a legal requirement and routinely kept in [other EU member states]*" with regard to the specified birds.
38. In responding to the request for information, DEFRA informed the complainant that it had previously provided him with all of the information it held falling within this part of the request and that therefore it was already accessible to him.
39. Specifically, DEFRA explained that a spreadsheet of information, which had been enclosed with a folder of information provided to the complainant in 2013, was already accessible to the complainant. However, the complainant argued that the spreadsheet is not the information he requested.
40. The Commissioner has considered the spreadsheet, which is essentially a summary of the legislative requirements in some EU countries regarding the ringing/other method of registering captive-bred wild birds, produced by DEFRA, and has considered whether it falls within the scope of this part of the request.
41. The wording of the complainant's request is such that he has asked for "*information requested and received*" by DEFRA showing that "*evidence of captive breeding is not required.*"
42. The complainant has explained therefore that he wanted to know what information DEFRA was relying on when the UK government wrote to the European Commission in 2011.

43. In his view, the spreadsheet is the "*end product*" of DEFRA's investigation into the requirements in other EU countries, rather than being the information in itself which DEFRA had requested and received.
44. The Commissioner is satisfied that, insofar as the spreadsheet represents a summary DEFRA's findings, it has some relevance to the request. She is also satisfied that the spreadsheet was already accessible to the complainant, as he had been provided with it previously.
45. The Commissioner has also explored with DEFRA if any further information is held.
46. During the course of the investigation, DEFRA's position has been that it does not hold any further information which falls within the scope of part (3) of the request.
47. However, in the course of the investigation, DEFRA has provided the Commissioner with a document which, it considers, provides an "*anecdotal picture*" of DEFRA's awareness of the requirements in other EU member states. The title of the document is '*Trade in Captive Bred Birds.*'
48. DEFRA's view is that the document does not fall within the scope of the request.
49. The Commissioner has considered the document and has determined that, in her view, it is relevant to part (3) of the request.
50. She has therefore determined that, since not all of the information held by DEFRA falling within the scope of the request was available to the complainant by other means at the date of the request, the exemption at section 21 of the FOIA is not engaged in this case.
51. She requires DEFRA to issue a fresh response to the complainant, in respect of part (3) of the request, which does not rely on section 21.
52. The response should consider the document '*Trade in Captive-Bred Birds*' under the legislation.

Section 10 – time for compliance

53. Section 10 of the FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt."
54. From the information provided to the Commissioner in this case, it is evident that DEFRA did not respond to the requests submitted by the complainant within the statutory timeframe of 20 working days. DEFRA

did not respond to the original request of 1 November 2016 until 3 January 2017, and then after clarification of the request was provided on 6 January 2017, did not issue a response until 17 February 2017. She has therefore found DEFRA to be in breach of section 10 of the FOIA.

Other matters

55. Timeliness/poor engagement: while there is no statutory obligation for a public authority to conduct an internal review under the FOIA, the Commissioner considers that it is best practice to do so. In this case, DEFRA did not respond to requests, and reminders from the Commissioner, to conduct an internal review. DEFRA engaged with the Commissioner only after she wrote a letter of investigation on 4 July 2017. This letter was responded to by telephone call on 9 August 2017, after the Commissioner's deadline for a response had passed; a subsequent ICO letter dated 10 August 2017 was not responded to until 4 October 2017; a subsequent ICO letter of 17 October was not responded to substantively until 9 December 2017. Further delays have ensued while asking DEFRA to consider the document referred to in paragraph 47. In many cases, repeated reminders have had to be sent by the Commissioner to encourage DEFRA to respond. The Commissioner would therefore expect better and more timely engagement from DEFRA in future.

Right of appeal

56. 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

57. 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.

58. 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

Alun Johnson
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF