

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 October 2018

**Public Authority:** Veterinary Medicines Directorate

**Address:** Woodham Lane  
New Haw  
Addlestone  
Surrey  
KT15 3LS

### Decision (including any steps ordered)

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1. The complainant has requested information relating to inspections and assessments of veterinary premises.
2. The Commissioner's decision is that the Veterinary Medicines Directorate (VMD) has not applied section 31 correctly
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - provide the complainant with a copy of the inspection report for the closed practice.
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

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5. On 29 January 2018, the complainant wrote to VMD and requested information in the following terms:

*"1. I would like to see a manual that covers the operation of your Veterinary Medicine Directorate inspections of veterinary premises  
(b) and what is assessed  
\*c) and how it is assessed"*

*(d) and how is what has been assessed recorded. What is the professional qualification to be an assessor*

*(e) What is expected of the assessor in terms of recording what is observed at inspection.*

*2. Any document that shows the decision to accept and rationale of accepting RCVS Practice Standards Scheme inspections as exempting the practices that hold RCVS PSS accreditation from inspection by the VMD.*

*3. Any document that shows that the VMD is aware that the RCVS PSS does not in the case of the most common type of inspection that they only record what has not proved satisfactory or otherwise would benefit from improvement. They do not record that successful parameters have been actually assessed.*

*4. I would appreciate an example of an inspection report*

*5. In terms of an actual VMD inspection report I should appreciate a copy for the practice (no longer open) of:*

*[Redacted] and if that is not available then a copy for [redacted] same address.*

*In the interests of clarity and given the public nature of this request I should like to emphasise I have no concerns about those premises but I would like to see a real report and these are local premises with which I am familiar."*

6. The VMD responded on 22 February 2018. It cited section 21 (accessible by other means) with regard to part 1 of the request, and provided a web link. With regard to parts 2 and 3 of the request, VMD provided a link to a press release relating to the subject.
7. In response to parts 4 and 5 of the request, VMD provided a copy of a blank report and a redacted report. It cited section 30(1)(b) of the FOIA as a basis for redacting the report.
8. Following an internal review VMD wrote to the complainant on 20 March 2018 and upheld its original position.
9. During the course of the Commissioner's investigation VMD withdrew reliance on section 30(1)(b) and sought to apply section 31(1)(g) in conjunction with 31(2)(a), (b) or (c), in the alternative.

## Scope of the case

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10. The complainant contacted the Commissioner on 26 March 2018 to complain about the way his request for information had been handled and stated:

*"I maintain that this is a statutory scheme and that the VMD have a duty as regulator in relation to licencing for veterinary medications. I do not accept their argument that they should withhold their inspection reports in the interests of what they claim is intended to foster vital cooperation. This is the 21<sup>st</sup> century in which transparency of regulation is what the public expect."*

11. The withheld information in this case comprises of a completed inspection report of a specific veterinary practice that is now closed and a further follow up report of the same practice The Commissioner considers the scope of the investigation is to be to determine if VMD has correctly applied section 31(1)(g) in conjunction with 31(2)(c), to the withheld information.

## Reasons for decision

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### Section 31 – Law enforcement

12. Section 31(1)(g) of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

13. Subsection (2) states that the purposes referred to in subsection 31(1)(g) are –

*(c) The purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.*

(There are further 'purposes', but these have not been referred to here as they are not relevant to the circumstances of this case).

14. To 'ascertain' is to make certain or prove. In this context it means that the public authority with the function must have the power to determine the matter in hand with some certainty. The public authority must not only be responsible for the investigation but it must also have the authority to make a formal decision as to whether that person has complied with the law. This could include taking direct action itself such

as revoking licences or imposing fines, or it could involve taking a formal decision to prosecute an offender.

15. Section 31 is also a qualified exemption. It is therefore subject to the public interest test whereby the public authority must consider the arguments for and against disclosure and demonstrate that the public interest rests in maintaining the exemption.
16. The purpose that VMD has considered would be likely to be prejudiced if the information was disclosed is section 31(2)(a), the purpose of ascertaining whether any person has failed to comply with the law, and/or section 31(2)(c), ascertaining whether circumstances would justify regulatory action.
17. In this case, in order for section 31(1)(g) of FOIA to be engaged, VMD must be able to demonstrate that the potential prejudice being argued relates to the interest contained in section 31(2)(c).
18. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur.
19. The VMD believe the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on the VMD to discharge, it still requires the VMD to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
20. The Commissioner has considered the application of section 31(1)(g) with subsection (2)(c). She has therefore considered whether the VMD is formally tasked with ascertaining whether circumstances would justify regulatory action.
21. VMD stated it was their understanding that these investigations/inspections need not be ones which an authority has a duty to conduct. It is enough that these are investigations/inspections which an authority has the power to conduct, and may, in the case in question, lead to a decision that the authority will take regulatory action.
22. This provision therefore does not necessarily require that the only, or even the main or dominant, purpose of the investigations/inspections should be prospective criminal proceedings.
23. That is a particularly important consideration for public authorities, such as the VMD, with regulatory functions or investigatory functions. The VMD is responsible for coordinating the enforcement of the Veterinary Medicines Regulations (VMR) and it may conduct investigations/inspections with a view to ascertaining whether a person should be

charged with a criminal offence or alternatively be dealt with under regulatory powers in different ways, such as, for example penalties or sanctions which may be imposed without criminal procedure, disqualification or loss of licence.

24. The withheld information was held by VMD as part of an investigation in to the practice's compliance with The Veterinary Medicines Regulations 2013 & the Misuse of Drugs Regulations 2001.
25. The Commissioner has considered her own guidance<sup>1</sup> when reviewing the withheld information and is satisfied that the information was obtained by VMD to assist in investigating if there had been any breach of its compliance regulations. The Commissioner has also taken into consideration a recent Tribunal decision<sup>2</sup>.
26. The VMD confirmed that the inspections had been carried out as part of a regular compliance monitoring process. The VMD further confirmed that its investigative powers are vested in its appointment as inspectors and, as inspectors it undertakes investigations into breaches of the VMRs as part of its routine investigations/inspections.
27. It seems clear that the VMD has the authority to conduct such compliance inspections, follow up investigations/inspections and to institute proceedings should it be deemed appropriate.
28. It explained that it judged that such collaboration could diminish if the VMD placed certain information, as contained in these reports, in the public domain because word would spread in what is a relatively close and connected business community, that the VMD was compromising this expectation of collaboration - of ensuring compliance by guidance and advice – by releasing specific information to the public, which the public, or others, might misunderstand or use to the detriment of that business. This could make the inspection process more adversarial and less collaborative contrary to the intention of Defra's approach to better regulation and enforcement. This would mean the VMD was less able to address suspected breaches of the VMR, here and elsewhere, and that part of VMD's role as regulator to protect the public interest would be less effective.

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<sup>1</sup> <https://ico.org.uk/media/1207/law-enforcement-foi-section-31.pdf>

<sup>2</sup>

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2119/Brown,%20Andrew%20David%20EA.2017.0131.pdf>

29. In response to the Commissioner it also explained that the Inspection Report becomes part of the history of compliance for a business. The inspection report is not an end to the compliance assurance process but a step along the way, including where the practice changes name but does business out of the same address, connected to some of the same people. VMD did acknowledge that it had not explained this to the complainant, but in hindsight it would have been appropriate to do so.
30. Finally, it pointed out that in relation to the publication of what enforcement action the VMD takes, it publicises all improvement notices, seizure notices, suspension and revocation of authorisations and approvals, and outcomes of prosecutions. That information remains on GOV.UK for one year.
31. VMD also took into consideration the fact that there is now a new practice on the site.
32. As indicated in paragraph 19 above, VMD has relied on 'would be likely to prejudice' its functions as a regulator. In order for the exemption to be engaged VMD also has to demonstrate the likelihood of the prejudice in line with the Commissioner's guidance<sup>3</sup> which states:  
  
*'would be likely' means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.*
33. The other factor to consider in this case is that the inspection of the previous practice that this case relates to has concluded several years earlier, which does weaken the arguments for withholding the information.
34. The Commissioner's view is that the likelihood of parties being reluctant to voluntarily provide information to the VMD would be higher if it was seen that information relating to ongoing monitoring might be disclosed, instead of information relating to concluded monitoring reports. However VMD has argued that the inspection report is not an end to the compliance assurance process but a step along the way, including where the practice changes name but does business out of the same address, connected to some of the same people.
35. In the circumstances of this case the Commissioner is not persuaded that disclosing the requested information would be likely to prejudice the

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<sup>3</sup> [https://ico.org.uk/media/1214/the\\_prejudice\\_test.pdf](https://ico.org.uk/media/1214/the_prejudice_test.pdf)

regulatory functions of VMD. The investigation was carried out as part of routine monitoring, rather than as a result of specific concerns being raised. Furthermore, it had been completed several years earlier and the practice is no longer in operation.

36. Therefore, the Commissioner is not satisfied that VMD has evidenced that there is a real and significant risk of prejudice and consequently section 31(1)(g) is not engaged. Therefore she has not gone on to consider the public interest test.

## **Right of appeal**

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.

39. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**