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22 March 2010

Dear Ms Ross

**FREEDOM OF INFORMATION ACT (FOIA): REQUEST FOR INTERNAL
REVIEW DH CASE REFERENCE 475015IR: TAP WATER IN NIGHT
CLUBS**

Thank you for your email dated 15 February in which you request an internal review into the handling of your previous correspondence.

Chronology

You originally wrote to the Department of Health on 22 January asking for the following:

“Any unpublished (i.e. not in the public domain) information held relating to the provision of tap water in nightclubs and bars in the UK.

This should include but is not limited to reports, analyses, assessments, emails, minutes of meetings. Please search for any information produced in the last three years.”

The Department of Health responded to you on 18 February as follows:

“The Department of Health supports universal provision of free tap water by premises licensed to sell alcohol for consumption on the premises, as this allows customers to moderate their alcohol intake, should they so choose. Many licensed premises already offer free tap water as a matter of course. While this is widely accepted as good practice it is not universally adopted by all premises.

In July 2008, the Department published Safe. Sensible. Social: Consultation on further action. One of the questions was an open question on what issues might usefully be addressed by a mandatory goal for alcohol retailers with the purpose of preventing alcohol-related health and social harm. A number of respondents suggested provision of cheap or free water. The summary of responses may be found at:

http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091369

The provision of free tap water was therefore included in a consultation by the Home Office on the content of a mandatory code of practice published on 13 May 2009.

The Home Office published its formal response to the consultation on January 19 2010 and free tap water is one of 5 new licensing conditions that will be included in the new mandatory code.

More information on the Mandatory Code, the published independent consultation analysis, impact assessment, and the findings of the public survey, which all include consideration of free tap water, can be found at the following website.

<http://www.homeoffice.gov.uk/crime-victims/reducing-crime/alcohol-related-crime/index.html>

I can confirm that the Home Office consulted the Department of Health on this proposal and that we hold further information relating to your request. However, this is being withheld under s35 (1) (a) of the Act (the formulation or development of Government policy). Section 35 (1) (a) is a qualified exemption and we are required to assess as objectively as possible whether the balance of public interest favours disclosing or withholding information.

The purpose of s35 is to protect the internal deliberative process as it relates to policy making. In other words, the exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options, the keeping of detailed records and the taking of difficult decisions. Premature disclosure of information protected under section 35 could prejudice good working relationships, the neutrality of civil servants and, ultimately, the quality of Government.

While the Department recognises a general public interest in transparency and openness in policy making, we also have to take into account that releasing information into the public domain at this stage could produce a reaction that would inhibit policy delivery, and there is a clear public interest in obtaining the best possible end result.

The Department also holds the individual consultation responses, but would not disclose these as the Home Office did not gain consent from individuals or organisations for their responses to be made public. Therefore, we would

need to contact everyone to get their permission, and with over 7,000 responses, this would involve disproportionate costs under s12 of the FOI Act.

As the Home Office are the lead department for this policy area, you may wish to consider whether to submit further FOI requests regarding the content of the Mandatory Code to them.

public.enquiries@homeoffice.gsi.gov.uk"

You then wrote again to the Department on 23 February as follows:

"On the 22nd January, I asked for "any unpublished information held relating to the provision of tap water in nightclubs and bars in the UK".

You kindly provided two links to reports of consultations already in the public domain which relate to the provision of tap water in nightclubs and bars.

However, you state that you have withheld consultations between the Home Office and the Department of Health relating the proposals under section 35(1) of the Act (formulation or development of Government policy). Given the great public interest in this issue, and the implications it has for the public's health and safety I would like to request an internal review of this decision.

Because of the large public interest in the provision of tap water in nightclubs, I believe this information should be disclosed to aid public participation in decisions affecting them, and so that the public can see the full decision making process involved in the proposals. "

The Review

In undertaking the internal review, we have identified some information that is relevant to your request, and where we have considered that the public interest does, in fact, favour release.

Consultation

This relates to development of the 'free tap water' proposal included in the Home Office consultation document entitled *Safe. Sensible. Social. Selling Alcohol Responsibly: A consultation on the new code of practice for Alcohol Retailers* published on 13 May 2009, and consists of earlier versions of the proposal, circulated by the Home Office, and drafting suggestions and commentary provided by other Departments.

Please note that we have provided extracts of the relevant text from the documents for your ease of reference as follows:

An initial draft of the consultation proposals dated 22.1.09 contains the following proposal [the bracketed section was removed via track changes]:

For those premises that have a premises license or a club premises certificate allowing them to sell alcohol for consumption on those premises, free tap water must be provided on request [to those also purchasing alcoholic drinks]

A subsequent draft dated 25.2.09 received by the Department of Health on 6.3.09 contains the following version:

Objective 3 – To ensure customers have the opportunity to mitigate the intoxicating effects of alcohol whilst out drinking.

For those premises that have a premises license or a club premises certificate allowing them to sell alcohol for consumption on those premises, free tap water must be provided on request [to those also purchasing alcoholic drinks]

The Department of Health made the following comment on this version in an email dated 9.3.09

I have asked [Dr] Mark Prunty for a view on how the ‘mitigating’ effects of water on ‘intoxication’ are described, just to be sure we’re medically accurate. No comments on the condition itself.

The internal email exchange between Department of Health officials dated 9.3.09 – 10.3.09 following up this remark is enclosed with this response.

The Department for Culture, Media and Sport made the following comments, dated 3.10.09, on this proposal:

They can already do this already [mitigate the effects of intoxication] by drinking soft drinks, teas or coffees

DELETE: not proportionate – we need to see evidence that this is necessary, especially given that refusal could lead to loss of licence etc. Do publicans really often refuse to provide water to customers who have purchase [sic] and consumed any kind of drink or food? There are also laws to stop the sale of alcohols to drunks and purchase on behalf of them etc, so this measure, in effect, is unnecessary and veers into the health objective territory and is therefore inappropriate for the code. Finally, it would be unworkable for licensed public land as well. There are hundreds of public spaces that have been licensed, in over 150 licensing authorities including village squares, parks farmers markets etc. **For all these reasons, the condition fails the tests**

Defra endorsed these comments in an email dated 3.11.09:

Defra endorses the DCMS comments and recommended changes. Apologies for the delay.

A subsequent draft of the consultation document, received by the Department of Health on 18.3.09 contains the following version:

Condition: 6) **Free tap water** must be provided on request to customers where it is available.

Applies to: on-trade

Rationale: Harm reduction advice and guidance to people who choose to drink alcohol often advises people to drink water alongside alcohol drinks or to alternative between an alcoholic drink and a soft drink in order to prevent intoxication and therefore reduce the risk of being involved in public nuisance or crime and disorder. Customers should be given the chance to drink a non-alcoholic drink for free in order to prevent / delay / ameliorate / mitigate further. Potential benefits include reduced levels of intoxication and lowered risk of crime and disorder or public nuisance and increases public safety. The licensed trade were content with this approach.

[DN: Legal advice is being sought on whether or how this would apply to licensed public land; premises that do not have access to running water]

Defra provided the subsequent comments on 20.3.09:

BR [better regulation] proportionality issue: if for no other reason, “where it is available” makes this condition entirely disproportionate. And is there really a problem here? Do pubs in practice refuse free tap water? Do people really end up drunk because free tap water was refused (presuming that paid-for tap water was available?). This all sounds implausible – more meat & drink to the Daily Mail.

Impact Assessment

On 7.4.09 the Home Office circulated an early draft of its impact assessment. This contained the following assessment in relation to tap water:

The KPMG review found that just 5% of premises refused to offer free tap water, equivalent to 6,600 premises nationally. There is unlikely to be any significant cost to these premises of providing free water and so we estimate that there will be no cost to the industry.

Please note that the impact assessment published by Home Office on 13.5.09 alongside the consultation document, revised this assumption and assumed that providing tap water will cost £13 per premises. A link to the impact assessment may be found here:

<http://www.homeoffice.gov.uk/documents/cons-2009-alcohol/>

Regulations

The Home Office has published regulations under the Policing and Crime Act that contain the requirement to offer-free tap water. These may be found at:

http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111491553_en_1

In emails dated 13.1.10, the Department of Health provided the following suggestion to the Home Office:

This comment may be superfluous - I have heard that some nightclubs only offer hot tap water, as this allows them to sell bottled drinks. May be just a horror story, but some premises have a profit motive in selling water not in giving it away. Are you confident it is implicit in the regulation that the "free tap water" is drinkable i.e. at or below room temperature, in a reasonable measure / container etc, or any other approach a premises might take to undermine the condition. This may be an issue for guidance.

And

I think hot tap water often has bacteriological problems, so serving it could breach the Food Safety Act, or risk doing so. It may be possible to cover that in the guidance.

Other information

We hold three further emails dated 12.6.09 relating to the Policing and Crime Act 2009 (at the time in its Bill stage), and the balance within the code of national conditions as opposed to local discretionary powers (free tap water is a national licensing condition).

The Department's view is that the information you request falls into this category. Section 35 is a qualified exemption and we are required to assess, as objectively as possible, the balance of public interest in the information's release against that in withholding it.

We understand that there is a general public interest in transparency and accountability, and in understanding the work of the Department of Health and the way in which it delivers public service priorities through policy development. These arguments would weigh in favour of release of the information you request.

However, we also take into account the strong public interest in allowing policy to be developed within a space that allows cross-departmental consideration without fear that the unilateral release by this Department of material subject to inter-Departmental discussions, and the likelihood of ensuing speculation regarding the details of those discussions, would be likely to erode the basis of trust which is essential to positive working relationships between this Department and colleagues across wider Government.

The purpose of the exemption at Section 35 of the Act is to protect the internal deliberative process as it relates to policy making. In other words, the exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options, the keeping of detailed records and the taking of difficult decisions.

The review is now complete.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner's Office (ICO) for a decision. Generally, the ICO cannot make a decision unless you have exhausted the complaints procedure provided by the Department. The ICO can be contacted at:

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

Yours sincerely

TONY DOOLE
Senior Casework Manager
Freedom of Information Team

ANNEX A

List of documents for disclosure:

09 March 2009	Email entitled "Tap Water" from Senior Policy Officer, Alcohol Programme to Mark Prunty, Senior Medical Officer, Drugs & Alcohol Programme
10 March 2009	Email entitled "Tap Water" from Dr Mark Prunty, Senior Medical Officer, Drugs & Alcohol Programme to Senior Policy Officer, Alcohol Programme
10 March 2009	Email entitled "Tap Water" from Senior Policy Officer, Alcohol Programme to Section Head, Alcohol and Drugs Programme
10 March 2009	Email entitled "Tap Water" from Section Head, Alcohol and Drugs Programme to Senior Policy Officer, Alcohol Programme