

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk



BSE and Secrecy

Implications for the Freedom of Information Bill

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Hon. President: Godfrey Bradman
Co-Chairs: James Cornford, Neil McIntosh
Director: Maurice Frankel

Parliamentary Co-Chairs: Helen Jackson MP
Archy Kirkwood MP
Richard Shepherd MP

BSE and the FOI Bill

This paper sets out some the BSE Inquiry's findings about secrecy.¹ The Inquiry concluded that secrecy:

- **delayed the introduction of remedial measures**
- **led to the introduction of technically defective regulations which failed to adequately control the use of potentially infectious material in animal feed**
- **contributed to a mistaken campaign of reassurance, which ultimately left the public feeling misled and destroyed the credibility of government pronouncements.**

We believe the Freedom of Information Bill does not do enough to prevent similar problems occurring in future.

In 1996, Tony Blair said:

‘When a health scare like BSE occurs, the public want to know the facts, people want to know what the scientific advice is in full, and they need to be sure that the public interest has always come first. They want to know if there was a relaxation of regulations which resulted in public safety being compromised....the whole sorry saga of how this matter has been handled has resulted in loss of public trust in government...The only way to begin to restore people’s trust is therefore to be completely open about what the risks are.’²

The bill does not, as it stands, provide that necessary openness.

Where food hazards are concerned, the establishment of the Food Standards Agency (FSA) should lead to a significant improvement. The Agency has the statutory *power* to publish its advice to ministers and other information and has indicated it will make openness a priority.

¹ Report, evidence and supporting papers of the Inquiry into the emergence and identification of Bovine Spongiform Encephalopathy (BSE) and variant Creutzfeldt-Jakob Disease (vCJD) and the action taken in response to it up to 20 March 1996, HC 887-1

² Speech at the Campaign for Freedom of Information annual Awards, 25 March 1996

However, the public's *rights* to information, from the FSA and all other safety authorities, will be those which the bill provides – which are still too weak.

Information about rail and transport hazards, infectious diseases, dangerous chemical plants, unsafe medicines and other problems will be covered by the bill's 'class' exemptions. These allow whole classes of information to be withheld even if the specific disclosure would not cause harm. These are a major defect, capable of blocking access to most of the information about hazards that people might seek.

In these areas, the bill would still allow access if an overriding public interest existed³. But there are two objections to relying on this provision.

First, ministers could veto any order to disclose on public interest grounds⁴. A veto could be exercised by a cabinet minister, after consulting his colleagues. Ministers say the need to justify the veto to Parliament would act as a powerful deterrent against its unjustified use.⁵ But ministers are not even required to *tell* Parliament when they have used the veto.⁶ Nor do ministers have to show that the disclosure being vetoed could cause *real harm*.⁷

But there is a more fundamental objection to this arrangement. The public's right of access should not depend on whether there is an overriding public interest in obtaining information. The right should apply *automatically* unless the authority can demonstrate that complying would cause harm. It is only if harm has been established that arguments of public interest should be relevant.

³ Under clause 2

⁴ Under clause 52

⁵ According to Lord Falconer, the veto 'will be available only on the signature of a senior member of the Government...we can be sure that this House and the other place will hold such signatories accountable for their actions...A Minister making any such decision would be required to inform the applicant of the reasons for his decision and, as I said, would be accountable to Parliament, his Cabinet colleagues, his constituents, members of his own party and the wider population for that decision...Ministers would expect to have to explain to Parliament the grounds on which the certificate has been requested and approved' [Hansard, HL, 25/10/00 cols 441-444]

⁶ They would have to tell the *applicant* and the Commissioner. The Information may not reach Parliament until the Commissioner's annual report, many months after the event.

⁷ The veto can be exercised if a minister believes that the Commissioner is wrong in concluding that the public interest in openness outweighs the public interest in maintaining the exemption in question. The minister does not have to show he is *right* in this belief, or that disclosure would cause any specific harm.

The following three class exemptions are of particular concern.

- **clause 34, which exempts all information relating to the formulation of government policy, including the facts on which it is based and scientific advice about potential hazards.**⁸ Even bodies like the Health & Safety Executive and Food Standards Agency are government departments, whose internal scientific advice would be protected by this provision.⁹
- **clause 35 which ministers de**
- **scribe as a ‘catch all’ exemption¹⁰ for information which “in the reasonable opinion of a qualified person would prejudice the effective conduct of public affairs”¹¹** Giving legal weight to an authority’s *opinion* prevents the Commissioner from overturning it, unless it is irrational.¹² It will be extremely difficult to refute even the weakest claim for exemption under this clause.¹³
- **clause 29 which exempts information obtained by prosecuting authorities, including MAFF in relation to BSE and safety bodies such as the Health & Safety Executive, Railway Inspectorate, Environmental Health Officers, Environment Agency and many other safety and environmental agencies.** The exemption applies indefinitely, regardless of whether disclosure could prejudice legal proceedings. **The findings of routine safety inspections, which do not lead to prosecutions, would be permanently**

⁸ The current ‘open government’ code of practice, introduced by the last government does not allow the facts to be withheld under the corresponding exemption. FOI laws in Australia and Ireland exclude facts and scientific and technical advice from the corresponding exemption.

⁹ Under clause 83, ‘government department’ is defined as including any body ‘exercising statutory functions on behalf of the Crown’. This includes regulatory bodies like the FSA and HSE.

¹⁰ Lord Falconer, committee stage of the FOI Bill, Hansard, House of Lords, 24/10/00, col 311

¹¹ Clause 35(2)(c)

¹² According to Home Office minister Mike O’Brien: ‘The Government consider that only a qualified person can have a full understanding of the issues involved in the decision-making processes of a public authority...we do not consider that it would be right for the prejudice caused by that sort of information to be determined by the Commissioner.’ [House of Commons, Committee stage of the FOI Bill, Standing Committee B, 27/1/00, Part II, col. 321.]

¹³ MAFF officials told the BSE Inquiry that the suppression of information about the existence of BSE in the early phase of the disease was justified on a variety grounds, some of which were notably weak.. For example, it was argued that publicity would encourage other institutions to undertake research which MAFF could not then co-ordinate; or that new cases of BSE would be notified to these bodies and not to MAFF. [Volume 3, chapter 2, paragraph 2.164]

exempt under this provision.

No information within these areas will be available as of right, unless an overriding public interest is established.

After a disaster has struck, the public interest in disclosure is obvious. But before anything goes wrong, the public interest may be difficult to establish, particularly if conventional wisdom asserts there is no problem, the information is complex or its significance is unclear.

The basic premise of freedom of information is that information should be available *without the applicant having to demonstrate a need to know*. The above class exemptions undermine that principle and must be amended if the bill is to provide an effective right to know.

The extracts from the BSE report that follow illustrate the consequences of failing to do this.

EXTRACTS FROM THE REPORT OF THE BSE INQUIRY

1. 'TOTAL SUPPRESSION' OF INFORMATION ABOUT BSE

As evidence of BSE came to light, MAFF adopted a policy of what the BSE Inquiry called “positive censorship”.¹⁴ The Inquiry concluded that this secrecy delayed efforts to control the disease.

According to one Senior Veterinary Investigation Officer, MAFF had a policy of “total suppression of all information on the subject”.¹⁵ Staff were prevented from publishing articles describing the new disease. They were instructed not to consult research workers at other institutions, including those with the most relevant expertise. A scientist at the leading research unit told the Inquiry he could have identified the presence of prions in infected tissue “within a day”¹⁶ – but had been unaware of the discovery of the new disease.

The Phillips Report is highly critical of this secrecy, which meant that veterinary surgeons and farmers failed to recognise and report cases of the new disease. It concluded: “*Had there been a policy of openness rather than secrecy, this would have resulted in a higher rate of referral of cases to MAFF in the earlier part of 1987. This, in turn, might have led to a better appreciation of the growing scale of the problem and hence to remedial measures being taken sooner than they were.*”¹⁷

¹⁴ Volume 3, chapter 2, paragraph 2.191

¹⁵ Volume 3, chapter 2, paragraph 2.69

¹⁶ Volume 3, chapter 2, paragraph 2.141

¹⁷ Volume 1, chapter 3, paragraph 180

What the report said:

“Gathering of data about the extent of the spread of BSE was impeded in the first half of 1987 by an embargo within the SVS [State Veterinary Service] on making information about the new disease public. This should not have occurred.”¹⁸

“The evidence demonstrates a clear policy of restricting the disclosure of information about BSE.”¹⁹

“In March 1987 a proposed publication about BSE in *Vision*, a [Veterinary Investigation Service] newsletter, did not proceed.²⁰ ...A proposed letter by a VIO [Veterinary Investigation Officer] to the *Veterinary Record* describing the clinical signs and the pathology of BSE was refused permission for submission to the journal²¹...An article by Mr Wells [Head Neuropathology Section, Central Veterinary Laboratory] for the *Veterinary Record*, which compared the pathology of BSE and scrapie, was embargoed and it was made plain that comparisons with scrapie were not acceptable.”²²

“By May 1987 this novel disease had been confirmed in four herds. No publicity, even within the State Veterinary Service, had been given to these early cases and it is likely that others had gone unrecognised and unreported.”²³

“It was important that MAFF should discover not merely the nature of the problem, but also its scale. If private vets and members of the VI (Veterinary Investigation) Service around the country were told of what the CVL had found and asked to look out for cattle with similar signs, reporting of cases, which might otherwise go unremarked, would be encouraged. Unfortunately, in the first half of 1987 there was a policy that one Senior Veterinary

¹⁸ Volume 1, Executive Summary, page xix

¹⁹ Volume 3, chapter 2, paragraph 2.175

²⁰ Volume 1, chapter 3, paragraph 176

²¹ Volume 1, chapter 3, paragraph 177

²² Volume 1, chapter 3, paragraph 179

²³ Volume 1, chapter 1, paragraph 61

Investigation Officer described as ‘*a total suppression of all information on the subject*’.”²⁴

“We are satisfied that there was good reason for Mr Gallagher [Senior Veterinary Investigation Officer] and his colleagues to conclude that they were faced with a ‘total suppression of all information’. According to Mr Sibley, the chairman of the British Cattle Veterinary Association: ‘*Throughout most of 1986 and 1987 most veterinary surgeons in practice, who were in the front line of disease diagnosis and control, were ignorant of the presence of this disease, and were not informed of its clinical signs or its significance as a potential national disease problem.*’”²⁵

“Unless private veterinarians and farmers were informed of the clinical symptoms of BSE, alerted to the importance of identifying cases of the new disease and urged to report suspect cases to VICs [Veterinary Investigation Centre], there was likely to be significant under-reporting of cases of BSE...a substantial number of cattle must have died from BSE without the significance of their illness being appreciated and without the State Veterinary Service being informed of it.”²⁶

“Dr Williams [Assistant Chief Veterinary Officer, Head Veterinary Investigation Service] decided that an instruction should be added to the directive to VI Service staff not to discuss BSE with or consult workers at Research Institutes or University Departments. He told the Inquiry that he felt that information should not be transmitted at that stage because MAFF’s knowledge of the disease was imperfect”.²⁷

“Had the information about the new disease been circulated widely at an early stage, it was likely, according to Dr Watson [Director, Central Veterinary Laboratory], that it would have encouraged other Research Institutes and University Departments to take an interest in it. However, MAFF would have had little or no control over the research being carried out by

²⁴ Volume 1, chapter 3, paragraph 176

²⁵ Volume 3, chapter 2, paragraph 2.171

²⁶ Volume 3, chapter 2, paragraph 2.174

²⁷ Volume 3, chapter 2, paragraph 2.162

other Research Institutes and University Departments; the timing of the release of information, and its content, would have been decided by those Institutes or Departments. We found this reasoning equally unconvincing. It seems to us that it would have been desirable for other Research Institutes and Universities to have taken an interest in the new disease. We see no good reason why the CVL should have wanted any control over the research carried out by them or over the release of information in relation to it. The argument merely reinforces our belief that MAFF wished to control the release of information about BSE.”²⁸

“Dr Williams gave the following reasons [for the embargo on discussing the new disease with research institutes] at the time: ‘*Because of the nature of the disorder, its political implications and possible effects on exports.*’ We believe that this was the true explanation, and a further example of the implementation of the policy of restricting dissemination of information about the new disease.”²⁹

“We can see why there were concerns that reports of a possible TSE [Transmissible Spongiform Encephalopathy] in cattle might harm the industry and, in particular, the export market. But this did not justify suppression of information needed if disease surveillance was to operate effectively.”³⁰

²⁸ Volume 3, chapter 2, paragraph 2.164

²⁹ Volume 3, chapter 2, paragraph 2.165

³⁰ Volume 1, chapter 3, paragraph 178

2. HOW SECRECY UNDERMINED CONTROLS

Following evidence that pigs could be infected with BSE experimentally, MAFF agreed in 1990 to ban specified bovine offal [SBO] from all animal feed – a decision it had previously strongly resisted.

The Inquiry found that:

- The new policy was implemented in ‘secrecy and haste’ and without proper consideration. The drafting of a new Order implementing the ban was taken place in secret. There was no consultation with MAFF’s own specialists, other departments or the local authorities who would enforce the new requirements.
- This secrecy resulted in “unenforceable” provisions.³¹ The report concluded that the problem “merited discussion and consultation with those who would be affected by the ban and those who would have the duty to enforce it. This was sacrificed to speed and secrecy.”³²

The Inquiry identifies at least three failures, which could have been anticipated at the time, had the issue been dealt with thoroughly and with proper consultation:

- (a) because of ‘oversight’, the ban did not include some potentially infective tissues
- (b) the Order only banned SBOs from *slaughtered* animals, not those from knackers’ yards³³ – which accounted for about 10 per cent of the total³⁴ – or hunt kennels. This failure was identified within 2 weeks of the Order being made.³⁵ Although MAFF’s legal department were told to ‘prepare urgent legislation’ to deal with any problems³⁶, the oversight was not corrected for 14 months
- (c) the new Order failed to require SBO to be kept separate from other material. Without this, the ban was not enforceable. This defect was not corrected for 5 years.³⁷

³¹ Volume 5, chapter 4b, paragraph 4.810

³² Volume 5, chapter 4b, paragraph 4.833

³³ Volume 5, chapter 4a, paragraph 4.52

³⁴ Volume 5, chapter 4a, paragraph 4.54

³⁵ Volume 5, chapter 4a, paragraph 4.47

³⁶ Volume 5, chapter 4a, paragraph 4.50

³⁷ Volume 5, chapter 4b, paragraph 4.653

What the report said

“When Mr Meldrum [Chief Veterinary Officer] learned that BSE had been transmitted to a pig, he decided that this should be kept confidential until it could be discussed by SEAC [Spongiform Encephalopathy Advisory Committee]. He discussed the finding by video conference link with Mr Gummer, of which no record was made in order to preserve confidentiality. Mr Gummer endorsed and adopted the policy of keeping news of transmission to a pig confidential until the Government had its response to this in place.”³⁸

“Mr Gummer was determined that news of the result of the pig experiment should not leak out until MAFF was in a position to announce its response to it....Although implementation of an animal SBO ban would involve, as a matter of critical importance, practices in the slaughterhouse, Mr Keith Baker, the Assistant Chief Veterinary Officer responsible for meat hygiene, was not consulted. Instructions were given that the Territorial Departments in Wales, Scotland and Northern Ireland were to be informed at the latest possible moment and in such a way that as few as possible people were in the picture.”³⁹

“SEAC advised on 7 September that SBO should be excluded from the feed of all animals. This advice, also, was kept confidential...”⁴⁰

“SEAC confirmed its advice on 20 September [1990]. The draft Order implementing it was submitted for signature on 21 September. MAFF announced the making of the Order in a news release on 24 September and the Order came into force on the following day. Mr John Maslin of the Animal Health Division was to describe the Order as made ‘in haste and secrecy’. That was a fair description.”⁴¹

³⁸ Volume 5, chapter 4b, paragraph 4.821

³⁹ Volume 1, chapter 5, paragraph 373

⁴⁰ Volume 5, chapter 4b, paragraph 4.822

⁴¹ Volume 1, chapter 5, paragraph 374

“The local authorities’ National Animal Health and Welfare Panel (National Panel), known until 1990 as the National Animal Health Panel (NAHP), was made up of members of different expertise from throughout Great Britain together with representatives from individual local authority bodies and MAFF....Lack of consultation with the Panel in respect of the introduction of the animal SBO ban led Mr Durnfold of Wiltshire County Council to write to Mr Maslin in 1991 in the following terms: *“I would reiterate my previous comments to you about the wisdom of allowing the National Animal Health Panel to comment on Orders immediately prior to their coming into force. Yet again another Order, introduced with no consultation, has created practical enforcement loopholes which, as always, will be exploited by those who choose to get round the regulations. I would reiterate my previous request to you that draft Orders should be sent to the Panel for comment.”*⁴²

“We do not believe that when Mr Meldrum urged that news of transmission to a pig should be kept ‘under wraps’ he intended that this should preclude any consultation necessary to ensure that appropriate action was taken in response to this event. No doubt the same is true of Mr Gummer. He could reasonably expect his officials to inform him if his call for confidentiality was in conflict with the demands of sound planning. With hindsight, we believe that it would have been better if MAFF had made public SEAC’s advice of 7 September, stated that the voluntary ban that was already in place would be replaced by a mandatory ban, and proceeded to consult with industry and with local authorities as to what would be needed to make such a ban effective. In the event, the secrecy and haste resulted in an absence of consultation that would have proved valuable. We suspect, too, that they contributed to a failure on the part of Mr Lawson [Head Animal Health Division MAFF] and Mr Meldrum to give the requirements of the ban the rigorous consideration that they required.”⁴³

“Had rigorous consideration been given by Mr Lawson and Mr Meldrum to the requirements of an effective animal SBO ban, they could not have concluded that the simple amendment that was made to the ruminant feed ban would be satisfactory. The problem was not an easy one. It merited discussion and consultation with those who would be affected by the ban and

⁴² Volume 5, chapter 4a, paragraphs 4.17 and 4.20

⁴³ Volume 5, chapter 4b, paragraphs 4.823-4.824

those who would have the duty to enforce it. This was sacrificed to speed and secrecy.”⁴⁴

“We do not believe that adequate consideration was given in 1990 to the need for enforceable statutory requirements to keep SBO separate from other material at the point of origin, in transit to renderers and at the renderers. Had the need for this been appreciated, it could have been achieved”⁴⁵

“We are satisfied...that there was ‘flagrant and widespread’ disregard of the requirement to keep SBO separate and identifiable from other matter that was essential if the animal SBO ban was to be effective.”⁴⁶

“We are...satisfied that it would have been possible, in 1990, to impose on slaughterhouse operators, knacker’s yards, hunt kennels and renderers the duties as to separation, staining and handling of SBO that were imposed in 1995.”⁴⁷

“It is a mercy that pigs have proved not to be susceptible to oral infection with BSE. Had this not been the case, the animal SBO ban would, for the reasons we have given, have failed to prevent a feed-borne epidemic of porcine spongiform encephalopathy, with the further risk of onward transmission to humans.”⁴⁸

⁴⁴ Volume 5, chapter 4b, paragraph 4.833

⁴⁵ Volume 5, chapter 4b, paragraph 4.848

⁴⁶ Volume 5, chapter 4b, paragraph 4.639

⁴⁷ Volume 5, chapter 4b, paragraph 4.849

⁴⁸ Volume 5, chapter 4b, paragraph 4.641

3. FALSE REASSURANCE

The Inquiry was highly critical of the Government’s ‘campaign of reassurance’ about BSE. This failed to acknowledge (a) the uncertainty of the government’s scientific advisers or (b) the fact that the reassurance was entirely based on the assumption that BSE controls were being rigorously applied. Yet the reassurance continued to be given even as it became clear that controls were *not* properly observed.

For example, in October 1995, the Chief Medical Officer, Sir Kenneth Calman, was quoted in a Department of Health press release saying that ‘beef and other meats are safe to eat.’ The Inquiry concluded that at the time Sir Kenneth knew there had been reports of the failure to comply with BSE regulations in slaughterhouses, and that this unqualified statement was unjustified.⁴⁹

The Report’s general conclusions

“The other casualty of the BSE story has been the destruction of the credibility of government pronouncements. Those responsible for public pronouncements – or at least some of them – were aware of the possibility that humans might have become infected before the slaughter policy and the SBO [specified bovine offal] ban were introduced. They saw no reason to draw attention to this. They believed that the measures taken had effectively removed the ‘theoretical risk’ of infection. They were concerned that the public should not be misled by scaremongers or the media into believing that it was dangerous to eat beef when this was not the case. Ministers and, on occasion, the Chief Medical Officers, made statements about the safety of beef which were intended to reassure the public. Insofar as these statements were believed, many clearly treated them as assurances that BSE posed no danger to human beings...When on 20 March 1996 it was announced that cases of new variant CJD were probably attributable to contact with BSE before precautionary Regulations were introduced,

⁴⁹ Volume 6, chapter 6, paragraphs 6.347-6.350

the reaction of the public was that they had been misled, and deliberately misled, by the Government.”⁵⁰

“The increasing knowledge about BSE over the years, which threw doubt on the theory that it would behave like scrapie, was not concealed from the public. However, the public was not informed of any change in the perceived likelihood that BSE might be transmissible to humans.”⁵¹

“The public was repeatedly reassured that it was safe to eat beef. Some statements failed to explain that the views expressed were subject to proper observance of the precautionary measures which had been introduced to protect human health against the possibility that BSE might be transmissible. These statements conveyed the message not merely that beef was safe but that BSE was not transmissible.”⁵²

⁵⁰ Volume 1, chapter 1, paragraph 115

⁵¹ Volume 1, Executive Summary, page xxi

⁵² Volume 1, Executive Summary, page xxi