

08 DEC 2009

BY POST AND EMAIL

For the attention of Joanna Morrow
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3 December 2009

Dear Sirs

Request for disclosure of information related to report *Point of Sale Display of Tobacco Products* under Freedom of Information (Scotland) Act 2002 ("the Act")

We refer to your colleague Mr Ian Robertson's letter of 13 October 2009, written on behalf of the University of Stirling and the Institute of Social Marketing in response to our letter of 14 September 2009. Copies of both letters are enclosed for your convenience.

We are disappointed that Mr Robertson's letter asserts that most of the information we requested should be withheld under various exemptions in the Act. We disagree with this decision, and write to exercise our right to request a review of it.

In order to inform your review, we set out below our views on the application of the various exemptions identified by Mr Robertson. We address the application of these exemptions as they are set out in the main body of Mr Robertson's letter, i.e. first the group of exemptions asserted to apply to points 1, 4 and 5 of our request, then the exemptions asserted to apply to each of points 2 and 3 of our request. Where we refer to the reasons given by Mr Robertson, these are the reasons given in the table in Annex 2 to his letter.

All primary data relating to the Survey and the analysis in the Report based on the Survey (request 1); all data files, including weight variables, connected with the Survey (request 4); and all record descriptions connected with the Survey (request 5)

These requests have been refused in their entirety, by reference to sections 38(1)(b), 33(1)(b), 27(2) and 36(2) of the Act (as set out in point 4 of Annex 2 of Mr Robertson's letter, which discusses these exemptions in relation to all three requests together).

Section 33(1)(b) – commercial interests

Mr Robertson asserts that provision of the requested information "would run the risk of this knowledge base [i.e. the Survey data underlying the Report] being exposed to competitors" and that this would somehow harm the CTCR's commercial interests. Yet there is no explanation provided of how the commercial interests referred to could be harmed.

The key results of the Survey have already been published in the Report. In this context, we cannot imagine any loss to the CTCR being occasioned by the data being made available to others. The most important purpose of the Survey data was to produce the Report. This purpose has been achieved. In relation to future publications providing further analysis of the data, the relevant intellectual property (and value to the University, in terms of the Research Assessment Exercise and so on) will not lie in the CTCR having exclusive access to the data itself, but rather in the models and techniques it develops and uses to analyse the data. Such intellectual property lies outside the scope of our request.

In fact, the only realistic use of the data at this stage by those outside the CTCR would be in assessing the quality and reliability of the conclusions drawn by the CTCR in the Report and other connected publications that are already in the public domain. CTCR should welcome such scrutiny as part of the essential process of academic debate and review. More importantly, it is clearly in the broader public interest for such assessment to be made possible, and not to be limited to a process of peer review engaged in only at a time and to an extent chosen by the CTCR itself.

Mr Robertson further asserts that "publicly disclosing this data would undermine the trust of our research participants". We do not understand this argument, given that (i) the letter says that the data will in any event be "published through the appropriate academic channels"; and (ii) any personal information relating to research participants could easily be redacted pre-disclosure.

Finally, Mr Robertson mentions that the relationship between CTCR and Cancer Research UK is very important to CTCR. This may or may not be the case. It cannot be relevant to the current request, however, as no explanation is provided as to how or why disclosure of the

data would affect this relationship. You will be aware that it is insufficient for the purposes of section 33(1)(b) simply to point to the existence of a commercial interest that is in some way connected with the information requested. Instead, it must be shown that there would be a harm to the commercial interest and, further, that this prospective harm is so serious as to outweigh the public interest in allowing access to the information. No such countervailing harm has been made out in this case.

Section 38(1)(b) – personal data

We disagree that the data requested is personal data. To the extent that participants can be identified by the inclusion of personal information, such personal information (which is presumably found in the same place on all individual records) could easily be redacted pre-disclosure. Moreover, Mr Robertson's letter suggests that personal identification would only be possible if the information requested is "taken together with other information held by the University". It is unclear whether this other information falls within the scope of our request. To the extent that it does, then that information could be redacted as appropriate.

Accordingly, this exemption is not engaged.

Section 36(2) – confidential information

Provided personal information is redacted, there is no basis to suggest that disclosure of anonymised response data would prejudice the "confidential" nature of information provided by Survey participants. The test for the application of this exemption is whether disclosure of the information would constitute a legally actionable breach of confidence on the part of the public authority. There is absolutely no prospect that an action for breach of confidence could be made out by any Survey participant as a result of the disclosure of anonymised / appropriately redacted data.

Accordingly, this exemption is not engaged.

Section 27(2) – future publication of research material

Mr Robertson's letter asserts that because the Survey data was obtained "in the course of a rolling research programme", disclosure at the present time would "be likely to prejudice substantially the University's interests". Yet, once again, no explanation is provided as to how this prejudice would arise. If anything, the rolling nature of the research programme suggests, in fact, that disclosure of the limited information that is the subject of the current request would not damage the programme. Such disclosure would not hinder the programme's ability to analyse the data. Nor would it prevent the programme obtaining further waves of data for analysis.

In relation to this exemption as, regrettably, throughout his letter, Mr Robertson simply asserts that harm will be caused, rather than giving any indication of how or why it will be caused. Given that there is a clear public interest in disclosure of the information (a public interest acknowledged in Mr Robertson's letter) such vague assertions cannot provide sufficient grounds for the withholding of information.

Public interest test – the need for disclosure now

The public interest test applies to both the "commercial interest" and "future publication" exemptions. Similar public interest considerations are set out in Mr Robertson's letter in relation to both of these exemptions, and so we address them together.

In fact, the considerations identified by Mr Robertson all point towards the importance of disclosing the information requested. The fact that the public policy issues involved have "a potential to impact very significant and positively on public health" and are connected with the expenditure of "[s]ignificant public funds" demonstrates the importance of the public being able to examine the data underlying the claims and recommendations made in the Report.

The key point is that disclosure is necessary in order to allow the claims and recommendations made in the Report – a document that was clearly produced with the intention of influencing public policy and, indeed, legislation – to be scrutinised by the public at large, including those whose interests stand to be affected by the policy agenda endorsed by the Report. This real and pressing public interest in disclosure cannot be overridden by vague and unsubstantiated references to commercial interests or research programmes being undermined. Further, it is important that disclosure of the data occurs now, and not at some unspecified future date depending on the discretion of the CTCR. Legislation severely restricting the display of tobacco at point of sale (the subject of the report) is being considered actively by the Scottish Parliament at the present time, and has already been passed (though not yet implemented) by the United Kingdom Parliament.

Decisions surrounding this legislation, which will have wide-ranging implications for the legal and commercial interests of others, have been and are being taken, at least in part, on the basis of the Report. The CTCR published the Report knowing and intending it to influence the formation of public policy. Having done so, it cannot now refuse to allow others with an interest in the policy-making process to scrutinise the underlying data. If the CTCR is allowed to withhold the data until the date of the conclusion of its research programme (which is not specified and will likely not happen for several years) it may by that stage be too late to undo the harms caused to the legal and commercial interests of others as a result of regulatory steps taken in reliance on the Report. This is clearly not in the public interest, which therefore demands disclosure now.

Public interest test – other factors

Mr Robertson asserts that the information requested "could be used to construct strategies that would increase smoking". No explanation of this assertion is given in the letter. We would suggest that this is because no reasonable explanation exists. The Survey concerned young people's attitudes to tobacco display. To the extent that there are clear conclusions to be drawn from this, the Report purports to highlight these. Accordingly, the importance of disclosure is to allow scrutiny of conclusions already drawn (in the Report and in connected CTCR publications). We presume there is no suggestion that the CTCR believes that other conclusions about attitudes and behaviour can be drawn from the Survey, but that it has chosen not to publish these. Even if this were the case, then the importance of disclosing the survey data, in terms of ensuring academic rigour and impartiality, would become even greater. In any event, it is entirely unacceptable for a public authority to withhold important information on the basis of an assertion about its possible use that is not supported by any reasoning or evidence whatsoever.

Finally, in terms of the effect of disclosure on the future conduct of the broader research programme, we refer to the points already made above. We simply cannot see how any harm would be caused, and Mr Robertson's letter does not offer any explanation in this regard.

All questionnaires used in the survey (request 2).

Our request for this information has been refused in its entirety, by reference to sections 33(1)(b) and 27(2) of the Act.

The reasons given for the application of these exemptions in relation to the survey questionnaires are essentially the same as those given in relation to the information within points 1, 4 and 5 of our request. We therefore repeat the points made above in relation to those requests, which we believe are equally relevant to the issue of the survey questionnaires, and show why the asserted exemptions do not justify the withholding of the questionnaires.

In particular, we refer you to the arguments above on the public interest in disclosing the data underlying the Report. The questionnaires themselves are crucial to any meaningful scrutiny of the fairness, accuracy and methodological rigour with which the Survey was carried out and the conclusions in the Report drawn.

All interviewers' handbooks and / or instructions used in carrying out the Survey (request 3).

Our request for this information has been partly refused, by reference to sections 33(1)(b) of the Act. The sections of the handbooks / instructions dealing with "questionnaire

completion" have been withheld, on the same basis as the questionnaires themselves have been withheld. Accordingly, we repeat the points made above as to why the questionnaires should be disclosed.

In addition, we would point out the particular importance of disclosing the full interviewers' handbooks / instructions. Scrutiny of these documents is essential in allowing identification of any structural or systemic defects in the design of the Survey. The only damage that could be caused to CTCR by the disclosure of the full handbooks / instructions would be if they show that the collection of the Survey data was in some way flawed. In terms of the quality and transparency of the public policy process, it is of paramount public interest that such flaws are revealed, and revealed at a stage when it is still possible to take them into account when basing legislation on the findings of the Report.

It is impossible properly to assess the suitability of the handbooks / instructions when the key sections (on "questionnaire completion") have been withheld. We note that these sections have been withheld because they "described the content of questionnaires". Even if it is the case (which we do not accept) that the *completed* questionnaires and associated data constitute intellectual property, the disclosure of which would be damaging, it is impossible to see how disclosing a *description* of the questionnaire itself would cause damage. Such a description cannot be said to constitute valuable intellectual property. Its disclosure, however, is absolutely critical to the public's ability to assess whether the questionnaire was designed properly and fairly and, consequently, how much reliance should be placed on the answers obtained in the Survey and the conclusions drawn in the Report. As with the other categories of information requested, the public interest in disclosure in this case clearly outweighs any interest in withholding disclosure.

You will be aware that under the Act you are obliged to respond to this request for a review promptly, and in any event within 20 working days.

Should you wish to discuss this matter further, please contact Fraser Campbell on 020 7006 8090 or fraser.campbell@cliffordchance.com. Please mark all correspondence for the attention of Fraser Campbell.

Yours faithfully



CLIFFORD CHANCE LLP

Encs.