

FoI briefing

December 2010

Freedom of Information and the content of project licences under the Animals (Scientific Procedures) Act 1986

The Freedom of Information Act (FoIA) came into full force in the UK on 1 January 2005. Since shortly before that time (December 2004), the Home Office has published 'abstracts' containing some information from most project licences granted under the Animals (Scientific Procedures) Act 1986 (ASPA).

These abstracts are intended to "contribute to greater openness, and to greater public understanding and debate, about the use of animals in science, and how it is regulated". However, to date, the full contents of project licences have remained confidential.

BUAV request to the Home Office for project licence application content

In December 2004 the Home Office posted a first tranche of project licence abstracts on its website. Within weeks (in January 2005), the British Union for the Abolition of Vivisection (BUAV) had written to the Home Office under the FoIA requesting the "actual information" contained in each of five project licences, identified from the abstracts.

Following the BUAV request, the Home Office took steps to consult those who had supplied the relevant information in their applications. Subsequently it provided some additional information beyond that contained in the published abstracts to BUAV. None of this additional information was exempt under FoIA. The Home Office commented that it "accepts that not all the information supplied on the form of application or appended as schedules to project licences was provided or held in confidence. Therefore we have sought various means to better inform the public debate about the licensing system and the programmes of work under ASPA."

The Home Office provided a narrative document with all the information that it was thought appropriate to disclose. It considered that the effect of providing documents in which confidential information was blacked out (or otherwise concealed) meant that the end product would be disjointed and difficult to follow.

Information Commissioner and Tribunal rulings

The BUAV subsequently pursued the system of complaints built into the Freedom of Information process. The Home Office position was initially upheld on internal review, and then by the Information Commissioner's

Office¹. However, at the next level, an Information Tribunal ruled against the Home Office and directed it to go back through the project licences, in effect sentence by sentence, determining which bits were truly confidential and which were not².

The Tribunal acknowledged the potential workload its verdict might generate. In the following passage it stated:

"We are aware of the practical consequences that follow from our decision on this point.... This may create particular problems, as Dr Richmond explained to us, in responding to a request for information within the 20 working day limit imposed on public authorities by FoIA section 10(1). We have a great deal of sympathy for any public authority which is placed in the position of having to take a decision, which could lead to criminal liability if wrong, against a tight timetable. However, this is not a reason which we feel requires us to depart from the conclusion we have reached as to the correct interpretation of section 24 ASPA..."

We do not underestimate the burden of work that is likely to fall on the Home Office when applying our interpretation of section 24 ASPA to the information in dispute in this case or to any future requests for information on licences granted under ASPA...

...it would have taken a great deal more time for every element of potentially confidential information to be identified, its true status to be established and the possible application of a public interest defence to be determined."

The Information Tribunal directed the Home Office to re-examine the information in dispute and identify which specific elements of each licence application

would have been protected by the law of confidence at the time of the original refusal to disclose.

Although the Tribunal decision has been overturned, this recognition of workload implications is significant.

The High Court judgement

The Home Office appealed and the High Court took a different approach³. The legalities hinge on the way that both the Freedom of Information Act is interpreted, and section 24 of ASPA. These provided statutory exemptions which applied to the rest of the information requested, in the light of which information had been withheld by the Home Office.

The judge noted that:

"it is clear from the evidence that those who seek licences from the Home Office for animal research will often be required to submit a great deal of detailed information beforehand which is sensitive or confidential for a variety of reasons. In particular, in order to satisfy the statutory requirements, it may be necessary for applicants to include material which is commercially sensitive, and/or potentially useful to competitors, and also details of locations and addresses which may be sensitive for security reasons..."

He likewise pointed out that:

"It is clear from the material before me that a positive decision was taken by the government to retain s.24 of ASPA alongside the provisions of FoIA, although other statutory restrictions were repealed to make way for a greater flow of information."

Some light is thrown on this decision by remarks made on 1 July 2004 by Baroness Scotland in the House of Lords:

"Section 24, the so-called confidentiality clause, prohibits the disclosure by Home Office Ministers and officials of confidential information relating to the use of animals in scientific procedures other than in the discharge of their functions under the 1986 Act. It creates a criminal offence and provides a maximum punishment of two years' imprisonment and a fine for unauthorised disclosure of information."

The core argument was whether section 24 of ASPA allowed confidential information to be protected on a more restrictive basis than FoIA alone. In practice, the answer was yes. The judge rejected the attempt of the Tribunal to get the Home Office to assess whether the information really was "confidential" or not.

The BUAV appealed unsuccessfully against this verdict. The Court of Appeal made a number of interesting comments in its judgement given on 30 July 2008³.

According to the judgement:

"in interpreting section 24 of ASPA, we must consider it in the context of the 1986 Act, and not through the spectacles of the later Fol Act. Viewed in that perspective, we see no reason why it should not be read as meaning what it says. The section is couched in subjective terms, directed at the state of mind of the official or other person in possession of the information. It raises a simple question of fact: does he know or have reasonable grounds for believing that the information was given in confidence. The latter words in turn direct attention to the position when the information was given and to the intentions of the giver at that time, either as expressed or as reasonably to be inferred from the circumstances... there is nothing in ASPA to justify limiting the scope of the protection by reference to any more general interest in public information, such as was later given effect by the Fol Act..."

The distinction can be illustrated by reference to the information contained in the profiles mentioned earlier. BUAV argues that information about the actual treatment of the animals cannot be confidential if the procedure used is entirely standard. We do not see the connection. Even if the procedures are standard, information about their use at a particular establishment can still be given in confidence. The lack of originality might of course be relevant to the merits of an action against the commercial rival seeking to use that information to copy the experiments in his own processes. But it is no reason to limit the protection against misuse of the information by a public official, to whom it has been given for a specific statutory person."

The judge concluded with the following statement:

"Finally, since the role and effect of section 24 is to be reviewed, we may offer two more general comments. First, the section does not seem to fit easily into the scheme of the Fol Act. The form of the section is readily understandable in its original context. The emphasis is on limiting the use of information, for the protection of the applicant. An official wishing to use that information for some other purpose is likely to lean on the side of caution, in order to avoid criminal sanctions. In practice he is very unlikely to take the risk without express agree-

ment from the applicant. The section seems much less well adapted to the use made of it in the Fol Act section 44, where it becomes the criterion for exempting information from the general principle of disclosure. In that context it is much less easy to see why the wishes or expectations of the applicant should be the only consideration. Secondly, we agree with the original court ruling that a test based simply on confidentiality may not adequately reflect the developments in the modern law, including the law of human rights. We do not think that these developments throw any light on the issue before us, but it would be desirable for them to be taken into account in any general review."

BUAV request to a university for NHP project licence content

Meanwhile, in June 2008 BUAV requested the actual content of two project licences involving the use of NHPs from Newcastle University. The university withheld this information, to which BUAV issued an appeal. The University's response to the Information Commissioner cited, amongst other things, that section 24 applies to the University.

Information Commissioner ruling

The Information Commissioner's Office (ICO) issued its Decision Notice to BUAV in March 2010. It ruled in favour of Newcastle University on the application of section 24³.

Section 24(1) (see page 6) was applied by Newcastle University as their project licences are centrally held by the NVS as part of their role under ASPA, and not by the university itself. This therefore means that disclosure of the project licences would not fall within the functions of the NVS under ASPA, and even if it did, section 41 of FoIA (see page 6) does not apply as the information was not held by the public body the Fol request went to (the university). This was upheld by the Commissioner.

The Commissioner also considered whether the applicant gave the information to the NVS in confidence, as this is also within the scope of section 24(1). He decided that:

"...at the time the applicants applied for both of the relevant licences the position was somewhat unclear, however, due to the sensitive nature of the information which must be submitted in order to obtain a licence, the Commissioner considers that it could

have been reasonably inferred by the NVS that the intentions of the applicant were that the information provided should remain confidential."

The Commissioner noted that even if the information was held by the university, the exemption in section 44(1)(a) was also applicable. Section 44 states that:

1 Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it:

- a is prohibited by or under any enactment,
- b is incompatible with any Community obligation, or
- c would constitute or be punishable as a contempt of court

This verdict from the ICO remains provisional, since it may be subject to further testing (through appeal) at the Information Tribunal or the courts.

Home Office guidance

The position of the Home Office as to whether applicants for project licences provide information in confidence is highly significant. There are a number of relevant considerations:

- Licences awarded before October 1998 were given a blanket guarantee that the information would remain confidential.
- In December 2004 abstracts began to be published on the Home Office website. From this point on applicants were aware that at least some information from their applications would be disclosed to the public.
- In January 2005 the Home Office issued guidelines to applicants stating that *"Information in this application which is not exempt from disclosure has to be provided to enquirers on request, but applicants should be aware that several exemptions may apply."*

Whether the content of project licences can be withheld as confidential information may depend on whether the application was made before or after January 2005. According to the ICO, however, the legal situation in such cases is unclear.

First tier tribunal ruling

BUAV appealed and on 10 November 2010 the first tier tribunal ruled on this case against the Information Commissioner (and therefore against the University)⁴.

The decision

The first tier tribunal decision was that the University does hold the information, and is not covered by section 24 of ASPA. The tribunal did not rule on the other grounds for possible non-disclosure of information, including s38 - danger to health or safety, and s43 - prejudice to commercial interests.

The matter for decision

The questions for decision by the information tribunal were:

- a. Whether at the time of responding to the request the University held the information that was requested.
- b. If the information was held by the University, whether the exemption in FOIA s44(1)(a) applied, on the footing that disclosure was prohibited by ASPA s24(1).

The text below is selected chunks of the tribunal ruling taken verbatim from decision notice, (apart from the headings):

The University structure

Dr Hogan was the certificate holder. His role as certificate holder was not explicitly recognised in his employment contract but it had been part of his duties since he was first appointed, and he accepted that in that role he represented the governing body of the University. It was part of his duties as University Registrar, for which he was paid. It was the University, not Dr Hogan personally, which provided all that was necessary to fulfil the statutory requirements in relation to the care and management of the animals and the provision of trained staff.

Professor Flecknell was responsible to Dr Hogan as Named Veterinary Surgeon. The role of NVS at the University attracted no additional remuneration and was not referred to expressly in Professor Flecknell's contract of employment; nevertheless it seems appropriate to us to infer that, by analogy with the position of Dr Hogan, the role was in practice part of his duties as an employee of the University. (We were informed that the NVS role is set up differently at other Universities; but that is not to the point; we are concerned only with the arrangement at Newcastle.)

The Home Office guidance states that certificate holders, or their nominees, are required to counter-sign each request for a project licence confirming that the application has completed the local ethical review process and that suitable facilities will

be made available. The purpose of this is to signify that corporate consideration has been given to the proposals and that the certificate holder has mobilised the expertise and advice available within and to the establishment. The Home Office strongly recommends that management systems ensure that regulated procedures are not carried out until copies of the relevant licence authorities are lodged with the certificate holder or his representatives.

While a licence was current, various people had legitimate access to it, including the Welfare Officer, the deputy NVS, the deputy project licence holder, research associates and PhD students holding personal licences, and Professor Flecknell's administrative assistant. Such access would take place under controlled conditions and no additional copies would be made. Those involved in the research needed access to the applicable licence in order to ensure that they were familiar with exactly what was permitted by it.

Information Tribunal analysis of what it means to hold information

FOIA contains no general definition of what it means to 'hold' information, but s3(2) states:

'For the purposes of this Act, information is held by a public authority if:

- a. *it is held by the authority, otherwise than on behalf of another person, or*
- b. *it is held by another person on behalf of the authority.'*

The effect of this subsection is to confirm the inclusion of information within the scope of FOIA s1 which might otherwise have been arguably outside it. The effect of paragraph (a) is that information held by the authority on behalf of another is outside s1 only if it is held solely on behalf of the other: if the information is held to any extent on behalf of the authority itself, the authority 'holds' it within the meaning of the Act. The effect of paragraph (b) is that the authority 'holds' information in the relevant sense even when physically someone else holds it on the authority's behalf.

'Hold' is an ordinary English word. In our judgment it is not used in some technical sense in the Act. We do not consider that it is appropriate to define its meaning by reference to concepts such as legal possession or bailment, or by using phrases taken from court rules concerning the obligation to give

disclosure of documents in litigation. Sophisticated legal analysis of its meaning is not required or appropriate. However, it is necessary to observe that 'holding' is not a purely physical concept, and it has to be understood with the purpose of the Act in mind. Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority. Conversely, we consider that s1 would not apply merely because information is contained in a document that happens to be physically on the authority's premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority. For example, an employee of the authority may have his own personal information on a document in his pocket while at work, or in the drawer of his office desk: that does not mean that the information is held by the authority.

The University submitted that the ASPA regime, which placed personal responsibility upon project licence holders and certificate holders, had the consequence that the requested information was held solely by those individuals and not by the governing body of the University. It was further said that ASPA s24(1) prohibited the dissemination of the licence even within the University, except to persons who had statutory functions under ASPA, such as the Welfare Officer and the personal licence holders. Indeed, since only certain individuals with statutory functions were entitled to access the information, University initially confirmed that it held the information and only very belatedly came up with an argument that it did not. While the ASPA regime is undoubtedly a material consideration, we do not consider that it has the consequences contended for by the University. The personal responsibilities laid on individuals by ASPA are an important feature of

the system of control, since they avoid the danger of dilution that would result if the responsibilities were assigned merely to an institution. But this striking feature of the regulatory structure should not be allowed to crowd out the larger picture.

We have set out our factual findings above. The animal research was a very substantial part of the University's activities, carried out for University purposes on University premises. The grants that were made to fund it were grants made to the University. The confidential information involved was generated within the University. The licences were physically held by Professor Flecknell as the NVS for the University's animal research, by arrangement with Dr Hogan, to whom Professor Flecknell was responsible. Dr Hogan was the certificate holder not in his personal capacity but precisely because as Registrar he represented the governing body of the University. In that capacity he held the information in the project licences. In our judgment the governing body held the information through him.

As we have indicated, the Commissioner and the University relied on ASPA s24(1) as engaging the s44(1)(a) exemption and hence prohibiting disclosure in the present case.

We have decided above that the University held the requested information at the material time. We do not consider that the University obtained the requested information in the exercise of functions under ASPA, nor was it given to the University in confidence. On the contrary, the information was generated within the University, and the University was not prohibited by s24(1) from using or disclosing it, subject to the rights of Professor Thiele or Professor Young.

The University is still considering its position and an appeal has not been ruled out.

Appendix

Exemption 41 of the Fol Act

Information provided in confidence

- 1 Information is exempt information if –
 - a it was obtained by the public authority from any other person (including another public authority), and
 - b the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
- 2 The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

Section 24 of Animals (Scientific Procedures) Act 1986

S24 provides that under the 1986 Act

“A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information ... which he knows or has reasonable grounds for believing to have been given in confidence”.

References

- 1 ICO Decision Notice - No: FS50088298. Home Office (The Complainant requested copies of five project licence applications as detailed in the abstracts published on the Home Office web site). http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50088298.pdf
- 2 Information Tribunal Appeal Number: EA/2007/0059. (The Complainant requested copies of five project licence applications as detailed in the abstracts published on the Home Office web site). <http://www.informationtribunal.gov.uk/Documents/decisions/buavdecisionwebsite1.pdf>
- 3 ICO Decision Notice - No: FS50215164. 3 March 2010. http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50215164.pdf
- 4 FIRST-TIER TRIBUNAL Case No. EA/2010/0064 http://www.informationtribunal.gov.uk/DBFiles/Decision/i459/BUAV_v_IC_&_Newcastle_University_%280064%29_PI_Decision_10-11-10_%28w%29.pdf