Neutral Citation Number [2010] UKFTT 525 (GRC)

IN THE FIRST-TIER TRIBUNAL Case No. EA/2010/0064
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50215164

Dated: 3 March 2010

Appellant: BRITISH UNION FOR THE ABOLITION OF VIVISECTION

Respondent: INFORMATION COMMISSIONER

Additional Party: NEWCASTLE UNIVERSITY

Heard at the Central London Civil Justice Centre, London W1

Date of hearing: 15 September 2010

Date of decision: 10 November 2010

Before

Andrew Bartlett QC (Judge)
Malcolm Clarke
Jacqueline Blake

Attendances:

For the Appellant: David Thomas

For the Respondent: Fiona Banks

For the Additional Party: Joanne Clement

Subject matter:
Freedom of Information Act s1, s3(2) – whether information held by public authority
Freedom of Information Act s44(1)(a) – whether disclosure prohibited by Animals (Scientific Procedures) Act 1986 s24(1)

Cases:
Digby-Cameron v IC EA/2008/010
McBride v IC EA/2007/0105
Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd [2007] EWCA Civ 197
Secretary of State for the Home Department v British Union for the Abolition of Vivisection [2008] EWCA Civ 870

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal determines the preliminary issues as follows:

(1) The requested information was held by Newcastle University at the time when the information request was responded to by the University.

(2) The requested information was not exempt from disclosure by reason of Freedom of Information Act s44(1)(a).

REASONS FOR DECISION

Introduction

1. The appellant, BUAV, has tried to obtain from Newcastle University certain information about experiments on non-human primates.

2. The right of any person to obtain information from a public authority under the Freedom of Information Act ("FOIA") applies only to information which the public authority holds. This appeal is concerned with what it means to 'hold' information for the purposes of FOIA. The governing body of the University is a public authority for this purpose: FOIA Schedule 1 paragraph 53(1).

3. A further issue, if the University held the information, is whether the University was prohibited from disclosing it by the statute which governs experiments on animals, the Animals (Scientific Procedures) Act 1986 ("ASPA").

4. The general approach of ASPA (which implements the European Directive 86/609/EEC) is that experimentation is only permitted when there is no alternative research technique available and the expected benefits are judged to outweigh the likely adverse effects on the animals concerned, and subject to minimising the number of animals used and their suffering. There is a strong difference of opinion between those who believe that lawful scientific experimentation on animals is justified and desirable, and those who believe that it is morally wrong. Our function is not to adjudicate on that dispute but to apply the applicable law to the issues in this appeal.

The request for information

5. On 9 June 2008 BUAV submitted a request to Newcastle University for the information set out in the project licences, issued under ASPA, which governed the primate research at the University which had been written up in three scientific papers published in 2006-2007. The request concluded with the words-

> 'Names (other than those of the authors) can be withheld, as can addresses. In addition, the BUAV accepts that information of a genuinely confidential nature can be withheld. Otherwise, however, the information disclosed should be as it is contained in the project licences in question.'

6. A project licence is granted by the Home Office and authorises a particular programme of work. Persons who undertake the work must themselves hold personal licences. In addition, the place where the procedures are carried out must be licensed under a certificate of designation.

7. On 30 June 2008 the University responded, confirming that it held the information requested but refusing to supply it, relying on various exemptions in FOIA. After an internal review the University adhered to its original decision, for reasons set out in its letter of 28 July 2008. The FOIA exemptions relied on were:

   s12 – cost of compliance in excess of limit

   s38 – danger to health or safety

   s43 – prejudice to commercial interests

   s44 – prohibition by another enactment, namely ASPA s24(1).

8. By letter to the University of 6 August 2008 BUAV explained that it was particularly interested in the sections of the project licences which dealt with 'achieving the objectives', 'list of protocols', and 'individual protocol sheets', being the sections explaining why it was said that animals had to be used and detailing the procedures to be conducted upon them. BUAV also wished to know the duration of the licences and information about any re-use of the animals. This letter did not elicit any substantive response from the University.

The complaint to the Information Commissioner

9. BUAV complained to the Information Commissioner on 19 September 2008. The complaint was set out in 20 pages of carefully reasoned argument. The Commissioner's investigation only got actively under way in June 2009.

10. In a letter to the Commissioner dated 10 February 2010 the University raised for the first time the possibility that it did not hold the licences; it said licences were held by the Named Veterinary Surgeon pursuant to his statutory role under ASPA. At the same time it contended that the information contained within the project licences was commercially sensitive information in which the University had proprietary rights. It also queried whether the true scope of the request was for the whole of the project licences, for those parts of the information within the licences which were discussed in the three published articles, or only for the three sections mentioned in BUAV's letter of 6 August 2008.

11. The Commissioner by an email of 10 February 2010 suggested to BUAV that it might be beneficial for BUAV to limit its request to the three sections. BUAV's response of 18 February 2010 stated that it was prepared to limit the request to those sections together with the dates and duration of the licences.

12. The Commissioner issued his Decision Notice on 3 March 2010. He decided against disclosure on the grounds that:

    a. the requested information was not held by the University;

    b. if it had been so held, the absolute exemption in FOIA s44(1)(a) was engaged because disclosure was prohibited by ASPA s24(1).

13. In the Decision Notice the Commissioner did not express a view on the application of FOIA ss 12, 38 or 43.

The appeal to the Tribunal

14. On appeal to the Tribunal BUAV challenged the Commissioner's conclusions and complained that the Commissioner had unfairly given BUAV no opportunity to comment on the University's contention that it did not hold the licences, which was raised for the first time shortly before the Decision Notice was issued.

15. The Commissioner maintained his position that his Decision Notice was correct.

16. We joined the University as a party to the appeal. The University supported the Commissioner's position. The University also indicated its continued reliance upon the s38 and s43 exemptions, while abandoning reliance upon s12.

The questions for the Tribunal

17. At the request of the parties the Tribunal ordered a preliminary hearing of the two principal issues raised in the notice of appeal.

18. Accordingly the questions for decision at this stage are:

    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).

19. At the preliminary hearing BUAV wished to develop its point that the Commissioner ought to have notified BUAV of the University's belated reliance on the new contention that the University did not hold the information. BUAV sought not only to rely on this aspect for its forensic force (which it was entitled to do) but also to contend that this omission made the Commissioner's decision unlawful. BUAV also sought to raise a new complaint concerning the University's process of internal review. The other parties objected to these developments forming part of the preliminary hearing. For reasons which we set out in writing and delivered to the parties, we upheld the objections, without deciding anything about the permissible subject matter of any future hearing.

20. The time available at the oral hearing on 15 September 2010 proved insufficient to enable the parties to complete their submissions, so we permitted further written submissions. Pursuant to our order, the University made further written submissions on 22 September, BUAV on 29 September, and the Commissioner on 13 October. The University made a second set of additional written submissions on 12 October, to which BUAV objected, but we decided to admit and consider them.

Evidence and findings

21. The evidence went considerably beyond that which was available to the Commissioner when he made his decision. We heard evidence on behalf of the University from three of its employees: Dr Hogan (the University Registrar and chief operating officer) and Professors Thiele and Flecknell. The evidence, so far as it was factual, was not subject to major challenge by BUAV; cross-examination was mainly directed to obtaining clarification and amplification. Some of the evidence given on behalf of the University was not evidence of fact but assertions about the legal position. On those aspects we have formed our own views. We also received the written evidence of Michelle Thew, chief executive of BUAV. Ms Thew's statement dealt with the purpose and context of the request; we did not find it of material assistance on the preliminary issues. For the system of control of animal experiments we were referred to ASPA and to the guidance on its operation issued by the Home Office. Our findings follow.

22. Licences and certificates under ASPA are issued to individuals, so that those individuals are personally accountable to the Home Office for compliance with the terms and conditions of the licence or certificate. The establishment to which the certificate relates must fulfil stringent criteria, and a project licence can only be issued on the basis that the research is to take place in accordance with specified conditions at a designated establishment for which a certificate has been issued.

23. A certificate of designation for an establishment may only be issued to a person who represents the governing authority of the establishment. The certificate holder is required to implement appropriate management systems and ethical review processes. The certificate holder must nominate at least one Named Animal Care & Welfare Officer to be responsible for the day to day care of the animals and at least one Named Veterinary Surgeon (NVS) to be responsible for providing advice on animal health and welfare. The certificate holder is responsible to the Home Office for the performance and conduct of the Welfare Officer and the NVS. The certificate carries with it a wide range of duties in relation to the care and management of the animals and the provision of trained staff. The central role of the certified establishment is apparent in several parts of the Home Office guidance, not least in Appendix J.

24. 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.

25. 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.)

26. The Home Office guidance states that certificate holders, or their nominees, are required to countersign 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.

27. The University sought at all times to comply both with ASPA and with the Home Office Guidance. The University Ethics Committee reviewed all applications for project licences. The committee was appointed by Dr Hogan and was chaired by someone not connected with animal research. The members of the committee included a lay person and an administrator. In

his oral evidence Dr Hogan attempted to present the ethics committee as his own committee, rather than the University's, but we found that unconvincing, particularly in view of the evidence in paragraphs 14 and 59 of Professor Flecknell's written statement, which described it as the University Ethics Committee.

28. The management system for supervision of the research (including in regard to compliance with the legislation) included periodic reports by the NVS to meetings of the University's Comparative Biology Centre Policy and Resources Committee, which was chaired by Dr Hogan and included the Pro-Vice-Chancellor of Medical Sciences, the chairman of the ethics committee, the chairman of the users group, a senior administrator, and someone responsible for safety.

29. Research on animals was an important part of the University's activities. At any one time the University had about 70 project licences in operation. Dr Hogan explained that it was not his practice physically to hold copies of the project licences himself. Instead he made arrangements for the NVS, Professor Flecknell, to hold them on his behalf. Dr Hogan accepted that there was no difference in principle between holding them himself and having Professor Flecknell hold them on his behalf.

30. Professor Thiele was the grantee of project licence 60/3362, which was issued on 26 November 2004 for a period of 2 years. The work referred to in two of the three published articles was done under this licence, within its two year period. On 2 November 2006 the licence was amended and extended to 26 November 2009.

31. The other published article related to work done under licence 60/2405, granted to Professor Young. Professor Thiele was one of the co-authors of the article. The licence was issued on 3 December 1999 and expired on 3 December 2004. Professor Young went on secondment to another organisation in 2006 and did not return to his role at the University after that date. He left the University's employment in 2009.

32. In some cases Professor Flecknell would have the original of the project licence and the grantee of the project licence would have a copy of it; in other cases the grantee would have the original and Professor Flecknell would have a copy. Professor Flecknell said that his practice was to keep only the current versions of current licences, in order to avoid any possible confusion. After licences expired Professor Flecknell would retain the most recently expired version for about four to five years, since this could be useful for reference purposes. At the date of BUAV's information request he held a copy of licence 60/2405 and a copy of the amended version of licence 60/3362.

33. Professor Thiele was uncertain whether he retained a copy of the original version of licence 60/3362 at the date of the information request (June 2008). But the information in it was still available to him, because records were available which showed the changes made, which resulted in the amended licence. Professor Flecknell explained that the exercise of deducing what had been in the original version of the licence had been undertaken by reference to the letter to the Home Office which asked for the amendments.

34. 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 Ph D 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. However, if a project licence holder were to move to another university, the research could not then be continued at Newcastle. We were not addressed on how that might affect the respective rights of the researcher and of the University.

35. The project licences were very detailed documents which included matters such as detailed protocols for what could be done, adverse effects expected, ameliorative measures, the circumstances in which animals should be killed, the circumstances in which animals could be reused, and what was to happen to the animals at the end. As a designated establishment the University provided the necessary staff training, routine equipment, drugs, animals, facilities, and insurances. All the staff involved were employees paid by the University.

36. A procedure not authorised by the licence would be likely to be a criminal offence under the legislation for preventing cruelty to animals (in particular, the Animal Welfare Act 2006). The University had a clear interest in assuring itself that its staff were not committing criminal offences while pursuing research at the University, and it was part of Dr Hogan's duty to the University to ensure, on the University's behalf, that no such offences were committed.

37. The information in sections 17-19 of the licence forms described the research objectives, hypotheses, research plans and experimental procedures. The research could only proceed when it was fully backed by external grant funding. The quality and originality of the research ideas was of key importance in obtaining such funding. Some of the information in these sections was of a confidential nature and of potential commercial value. (Beyond this, we make no finding at this stage concerning the precise extent of the confidential information in the licences.) As Professor Flecknell stated: 'This information could be very valuable to another academic, who might be able to steal a march on the project licence holder by using their

ideas and/or methodologies to conduct the research themselves.' As compared with the licences, the applications for external funding would contain less procedural detail and more scientific detail.

38. The confidential information contained within sections 17-19 was generated within the University. Professor Thiele considered that he held intellectual property rights in it. Dr Hogan considered that the University also held such rights. In his letter of 10 February 2010 to the Commissioner he wrote:

> 'The information contained within the project licences … is commercial information in which the University has proprietary rights.'

39. On behalf of the University Ms Clement took pains to submit that the University's claim that it had proprietary rights in the information was put forward as an alternative position, only applicable in the event that we decided against the University's contention that it did not hold the information. While we readily understand the considerations which dictated the making of such a submission, we found the evidence to be clear that the University's proprietary claim was unconditional. This was apparent not only from the letter of 10 February 2010 but also from the University's letters of 30 June 2008 and 28 July 2008 and from Dr Hogan's oral evidence.

40. The University, in its further written submissions made after the hearing, contended that it would be unfair if the Tribunal were to consider questions of ownership of the intellectual property without detailed submissions from the University, and that those questions would depend upon a careful analysis of the employment contracts of the researchers and the law of intellectual property, neither of which formed any part of the hearing or of the submissions made. While we accept that a full understanding of the University's intellectual property rights would probably require detailed inquiry into those matters, it is not necessary for us to enter any more fully upon that area or to adjudicate upon the precise nature or extent of the rights claimed by the University. For the purposes of the present issues it is sufficient for us to proceed on the broad basis of the evidence which the University itself furnished to us concerning its intellectual property rights, and we do not consider that it is unfair to do so.

41. Since the end of 2004 the Home Office has required the preparation of an abstract describing new projects, limited to 500 words, for publication on its website. This is written at a sufficiently high level of generality not to reveal confidential or commercially sensitive information. The two licences with which the present case is concerned were granted before that system came into operation.

42. ASPA s24(1) provides:

> '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 has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence.'

43. Professor Flecknell expressed the view that this meant – to take an extreme example – if he were asked by the Vice Chancellor of the University to provide him with a copy of a project licence, he could not comply with the request without committing an offence, because the only persons entitled to access the information in the licence were those performing statutory roles under ASPA. Whether that is correct is a matter of law which we shall consider below. But we observe here that his evidence was not consistent on this point. For example, his administrative assistant had no statutory role under ASPA, but according to him it was she who would file copies of the project licences or amended licences when received from the Home Office, and send copies to the project licence holder.

44. For the purposes of the hearing we were supplied in confidence with copies of the requested information, but in the event we did not find it necessary to refer to it except for the purpose of ensuring that we correctly understood its general nature.

Legal submissions and analysis

Whether the University held the requested information

45. While information will usually be recorded in documents, the rights created by FOIA relate not to documents as such but to information recorded in any form (see FOIA s1 and the definition of 'information' in s84). The question is whether the public authority holds the requested information.

46. 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.'

47. 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.

48. '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. A Government Minister might bring some constituency papers into his departmental office: that does not mean that his department holds the information contained in his constituency papers.

49. The University submitted that in order for a public authority to 'hold' information, it must be able to (i) manage and control that information, (ii) edit and delete the information without the owner's consent, (iii) have unrestricted access to the information; (iv) apply its own policies and procedures to the information, and (v) decide whom to send it to or whom to withhold it from. These tests were said to be derived from *McBride v IC* EA/2007/0105 and *Digby-Cameron v IC* EA/2008/010. We do not accept this submission. Depending on the particular facts of a case, the features referred to in those cases may be useful matters to consider when looking at whether the public authority holds the information, but they should not be read as if they had been intended as definitive tests of whether information is 'held', and we consider there is no warrant in the wording of the statute for regarding them as such. It may also be necessary to take into account any relevant statutory regime; whether the regime will affect the result must depend upon the circumstances. On the facts of *Digby-Cameron* the statutory regime determined the result; on the facts of *McBride* it did not.

50. We should add that we derive no assistance from consideration of the definition in regulation 3(2) of the Environmental Information Regulations 2004. The Regulations did not exist at the time when FOIA was enacted.

51. 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, s24(1) effectively prohibited the University from holding the information at all.

52. The Commissioner supported this submission on the basis not of the statutory regime alone but having regard to the evidence, which he submitted showed that the information was in fact ring-fenced so that only individuals with statutory roles could access it.

53. In the light of the evidence which we received, we have come to the conclusion that these submissions are artificial and unrealistic. We are not surprised that the 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.

54. 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.

55. We were referred to the short discussion of the familiar rules of attribution of knowledge to a corporate body found in the judgment of Arden LJ in *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* [2007]

EWCA Civ 197 at paragraphs 49 and 54-56. We found nothing there which required us to alter our view.

56. Mr Thomas submitted that the result for which the University contended was an affront to common-sense. He submitted it would be remarkable if the University did not hold important information about extensive animal research carried out on its premises by its employees, for which it received the funds, for which it provided the facilities, the training, the ancillary staff, the drugs, the routine equipment and the necessary insurances, in respect of which the University owed duties of care to safeguard employees and the local community from biosecurity risks, in respect of which the University claimed intellectual property rights, and for which its Registrar acted as the certificate holder representing the governing body and protecting the interests of the University. We agree with Mr Thomas, and consider the common-sense answer to be the correct one on the facts of this case. We also do not consider that ASPA s24(1) prohibited the holding of the information by the University within the meaning of FOIA s1.

57. The parties were in agreement that the purpose of s24(1) was to protect information given in confidence for the purposes of ASPA. In *Secretary of State for the Home Department v British Union for the Abolition of Vivisection* [2008] EWCA Civ 870 Carnwath LJ explained its purpose in the context of an issue concerning the extent of the restriction that it placed on Home Office officials who received information pursuant to ASPA. He said:

> 'section 24 … is concerned with the relations of citizen and state. The applicant, required by the state to provide information for a particular purpose, is given statutory protection against its use without his consent for any other purposes. …
>
> 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 agreement from the applicant.' [paragraphs 31, 35]

58. We note that the necessary ingredients of the offence are (with our emphasis):

    a. that the person has <u>obtained the information in the exercise of his functions under ASPA</u>;

    b. that the person <u>discloses</u> the information otherwise than for the purpose of discharging his functions under ASPA;

c. that the person knows or has reasonable grounds for believing the information to have been given in confidence.

59. Because of element b, the offence can only be committed by a disclosure made otherwise than for the purpose of discharging functions under ASPA. So, for example, if one Home Office official hands the information on to another Home Official, bringing that official into the circle of confidence within which the information is handled for the purposes of ASPA, that is not a disclosure contrary to s24(1).

60. Of more importance to the present discussion are elements a and c. Because of those elements, the offence cannot be committed by the person or persons to whom the information belongs or from whom it originated. The offence applies only to those who have received the information because of their functions under ASPA. The persons who have commissioned or created the information are the persons whom s24 seeks to protect. Those persons have not 'obtained' the information in the exercise of functions under ASPA, nor does it make sense to speak of the information as having been 'given' to them. If they choose to disclose the information, they are entirely free to do so, so far as ASPA is concerned. When Professors Thiele and Young published the articles reporting their research, it was for them to decide, in consultation with their University colleagues, what to publish and what to keep confidential.

61. According to the University's evidence, both the University and Professor Thiele considered themselves entitled to intellectual property rights in the information concerning Professor Thiele's research. In our view the reason that the information was 'ring-fenced' within the University, ie, kept securely and only made available to those who had a justified reason for seeing it, was to protect the intellectual property rights which they claimed, and to reduce the risk of the information getting into the wrong hands to the prejudice of Professor Thiele and the University, not to avoid the commission of offences under ASPA s24(1). A similar analysis would apply to the research led by Professor Young.

62. For the above reasons we reject the submission that ASPA s24(1) prevented the University holding the information for the purposes of FOIA s1.

63. The Commissioner and the University raised a subsidiary point concerning whether the requested information was held in the case where the unamended licence was no longer available. We keep in mind here the distinction between the licence as a document and the information contained in the licence. On the evidence it does not appear that the absence of the unamended document prevented the University from continuing to hold the information, because the University retained both the amended licence and a letter to the Home Office detailing the amendments, from which the contents of the unamended licence were apparent.

The exemption under FOIA s44(1)(a)

64. Section 44 provides:

> '(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 …'

65. 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.

66. 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.

67. Accordingly, we do not consider that disclosure by the University was prohibited by ASPA s24(1).

Conclusion and remedy

68. Our decision is that the University held the requested information at the time when the University responded to the request, and that the exemption in FOIA s44(1)(a) did not apply, because disclosure by the University would not involve a contravention of ASPA s24(1).

69. Accordingly the next step will be an order giving directions for the determination of the remaining issues. The Tribunal will consult with the parties and set a date for a directions hearing.

70. Our decision is unanimous.

Andrew Bartlett Q.C.
Judge

Date: 10 November 2010