

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 February 2010

Public Authority: Home Office
Address: Ground Floor NW Quarter
Seacole Building
2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested a copy of a project licence or licences, involving certain, specified, animal experimentation. This was refused under section 44 of the Freedom of Information Act as the disclosure is prevented under another enactment, section 24 of the Animals (Scientific Procedures) Act 1986 (ASPA). A previous case, for similar project licences, was also refused under section 44 of the Act, and that refusal was upheld by the Court of Appeal, and the Commissioner has therefore decided that the information in this case was correctly withheld by reference to section 44. The Home Office did, however, breach sections 10(1) and 17(1) of the Freedom of Information Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Information Commissioner has previously considered a complaint, from the same complainant, about a request for the information contained in a project licence for procedures involving animal experiments licensed by the Home Office. The Commissioner issued a Decision Notice in that case (reference FS50088298), which was appealed to the Information Tribunal (reference EA/2007/00590), the High Court ([2008] EWHC 892 (QB)) and the Court of Appeal ([2008] EWCA Civ 870), which upheld the Commissioner's decision that the information was exempt from disclosure.
3. The request in case reference FS50088298 was worded slightly differently. On the 12 January 2005 the complainant had requested that the Home Office disclose to him the following information:

"..the actual information contained in each of the following licences (using the title given to the abstract)

Wound Healing

Relief from chronic pain by use of antidepressants

Studying disorders of balance

Metabolism and excretion studies for new candidate drugs

Genetically modified animals and Respiratory diseases.

We are content that the information should be in anonymised form if you believe that the exemptions in section 38(1) of the FOI Act applies."

The current request for information was (with reference to a specific series of procedures licensed by the Home Office) for:

"A copy of the project licence or licences in question (suitably anonymised)".

4. The Commissioner is satisfied that the request under consideration here is therefore substantially similar to that contained in the request of 12 January 2005 as it requests the information contained in a project licence or licences issued by the Home Office under ASPA. The difference between the two requests is simply that the current request asks for the information in the form of 'a copy of the project licence or licences'.
5. The complaint which is the subject of this Decision Notice was submitted prior to the ruling of the Court of Appeal in the earlier case and, by the time this complaint was initially investigated, an application for leave to appeal to the House of Lords had been made. That application was subsequently refused.
6. A decision of the Court of Appeal is binding on the Commissioner.

The Request

7. On 10 October 2007, the complainant wrote to the Home Office in connection with a project licence issued by the Home Office under the Animals (Scientific Procedures) Act 1986 (ASPA), in relation to specified animal experiments. It was argued that the licence in question might contravene paragraph 5.42 of the Secretary of State's guidance, issued under section 21 of ASPA¹. The letter included a request for information under the Freedom of Information Act 2000 for:
 - i. *"A copy of the project licence or licences in question (suitably anonymised)*
 - ii. *any internal Home Office guidance about the meaning of the phrase 'any procedure likely to cause severe pain or distress that cannot be alleviated' or its constituent parts".*
8. The Home Office replied on 28 November 2007, informing the complainant that it was refusing part (i) of his request under the exemption provided by section 44(1) of the Act (prohibitions on disclosure) because the disclosure was prohibited by another enactment, namely section 24 of ASPA. It was also argued that the exemptions provided by section 38(1)(b) (health and safety), section 41(1) (information provided in confidence) and section 43(2) (commercial interests) may also be applicable, but that due to the overriding nature of section 44 of the Act these had not been considered formally.
9. The Home Office, however, volunteered what it described as a 'narrative' which it suggested *"serves to contextualise and make comprehensible that part of the information contained in the relevant project licence which is not exempt from disclosure"*. In response to part (ii) of his request, the Home Office explained that no information was held.
10. On 12 December 2007, the complainant requested an internal review of the Home Office's decision.
11. On 28 January 2008, the Home Office replied with the outcome of that review. It upheld the decision to withhold the information on the basis of the exemption provided at section 44 of the Act, and went on to also consider arguments in relation to the other exemptions listed, concluding that those exemptions were also engaged and, where applicable, the public interest in withholding the information outweighed the public interest in disclosure.

¹ <http://www.archive.official-documents.co.uk/document/hoc/321/321.htm>

The Investigation

Scope of the case

12. On 16 May 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points.
- He accepted the Home Office's response, that no information was held in relation to part (ii) of the request, and did not pursue that element.
 - The complaint should not be adjudicated on until the Court of Appeal had determined the appeal.
 - The complainant proposed to make detailed submissions in light of the outcome of that appeal.
 - The complainant also raised concerns over the Home Office's provision of a 'narrative', which he described as *"not a permissible approach to a public authority's obligations under the FoI Act, where an applicant has not requested a summary (see section 11)"*.

The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

13. On 5 February 2009 the Commissioner wrote to the complainant to advise him that, in line with the complainant's suggestion, he proposed to take no action in the investigation of the complaint, until the appeals process was completed. He requested that the complainant notify him when the various appeals had run their course.
14. On 9 February 2009, the complainant confirmed that the House of Lords had dismissed his petition for leave to appeal, and he indicated that he would write shortly with his views on the implications for his complaint.
15. On 23 February 2009 the Commissioner advised the complainant that, as the previous case involved a similar request and had been adjudicated as far as the Court of Appeal, there appeared to him to be no reason why the current complaint would result in a different decision (ie to uphold the exemption) than in case reference FS50088298.
16. On 17 March 2009 the complainant replied, indicating that he intended to make further representations, in particular relating to his arguments about the Home Office's provision of a 'narrative'.
17. The Commissioner replied on the same day with his view that the 'narrative' summary had been offered in a spirit of helpfulness.
18. The complainant responded on 18 March 2009 with further arguments and indicated that he would follow up with more developed arguments at a later date.

19. On 19 March 2009 the Commissioner acknowledged the complainant's arguments and agreed that his investigation would be to examine both the accuracy of the summary compared to the original document, and what had been done by the Home Office to agree the extent of any non-confidential material which could be disclosed.
20. On 19 March the Commissioner asked the public authority for details of the correspondence between itself and the licensee regarding confirmation sought from the licence applicant as to the extent of any confidentiality. The Commissioner also commented on the validity of the summaries provided, in light of the Information Tribunal's comments, and indicated that he wished to examine the accuracy of the summary provided by comparing it to the original licence application.
21. On 20 March the complainant replied, accepting that the Court of Appeal decision is binding on the Commissioner, and stating his belief that the issues are whether it applies in the present circumstances and whether the summary is a complete and accurate one.
22. On 21 April 2009 the complainant wrote again to the Commissioner, stating:

"I have looked again at my email to you of 18 March. In light of the indication in your reply the following day that you accepted that the crucial issue was whether the summary ('narrative') provided by the Home Office is a proper one, I do not think I need to add much to what I said in my email, or to convert it into a formal submission."

He also provided the Commissioner with some specific examples of elements in the summary which were considered to be inadequate.

23. On 21 September 2009, after various delays, the Home Office provided the Commissioner with a copy of the original licence application, a copy of the 'narrative' provided to the complainant, and its clarification of the process by which it had established the views of the licence holder with respect to the confidentiality of the licence application. This explanation included copies of correspondence between relevant parties.

Analysis

Exemptions

Section 44

24. The Commissioner observes that this case is substantively the same as the previous case (reference FS50088298). The requested information is of the same essential nature, and has been refused for the same reasons. The Commissioner's decision in that case was appealed as far as the Court of

Appeal, which determined that the information was properly withheld by reference to section 44 of the Act. The judgement of the High Court and Court of Appeal substantially upheld the Commissioner's arguments in his Decision Notice. The arguments centred on the reasonable belief of the Home Office that the information contained in the project licences was given in confidence. The circumstances here are no different and the Commissioner has therefore decided in this case that the information was properly withheld. The complainant has accepted that the Commissioner is bound by the decision of the Court of Appeal.

25. During the course of the Commissioner's investigation it was agreed with the complainant that the investigation would focus on these specific submissions:

- that the Commissioner consider the adequacy of the 'narrative' summary provided by the public authority as a response to his request for information; and
- also examine what steps were taken by the Home Office to establish what aspects of the information provided in the project licence application were not considered by the licensees to have been given in confidence.

These elements do not relate to the fundamental issue of the applicability of section 44 of the Act to the withheld information and will be covered in more detail in the Other Matters section of this Decision Notice.

Procedural Requirements

26. Section 10(1) provides that –

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

Section 1(1) states -

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

Furthermore section 17(1) states -

'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) *states that fact,*
- (b) *specifies the exemption in question, and*
- (c) *states (if that would not otherwise be apparent) why the exemption applies.'*

27. In this case the complainant made his request on 10 November 2007, but the Home Office did not provide him with a decision until 28 November 2007. Accordingly, the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, the Home Office breached the requirements of section 10(1); and that it also breached section 17(1) by failing to provide the details required by that section within 20 working days.

The Decision

28. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- the refusal of the request on the basis of the exemption provided by section 44 of the Act.

29. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- in failing to confirm or deny within 20 working days whether it held the requested information, the Home Office breached the requirements of section 10(1); and it also breached section 17(1) by failing to provide the details required by that section within 20 working days.

Steps Required

30. The Commissioner requires no steps to be taken.

Other Matters

31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:

The evidence provided by the Home Office

32. The Commissioner has confirmed that, following an earlier request, the Home Office entered into detailed correspondence with the licensees, or their legal representatives, in order to prepare an agreed response which would satisfy the concerns of both sides. An examination of the correspondence shows that, for its part, the Home Office was mindful of its responsibilities under the Freedom of Information Act and wished to ensure that information which should be disclosed was not withheld, or that information was not omitted which could lead to further correspondence and requests. The licensee's concerns were explained to be primarily those of health and safety, and commercial confidentiality.
33. The agreed form was also chosen to provide a standard which could be adhered to in similar requests. It was considered that any inconsistencies in the nature and level of detail of such summaries could invite speculation about the relative sensitivity or degree of confidentiality considered applicable by the licensees in the various cases. The summary was divided into numbered sections, which correspond to similarly numbered sections in the full licence application.
34. The complainant provided an argument in respect of section 17 of the narrative: that references to material already in the public domain were not disclosed and as that material was already in the public domain, it could not be considered confidential. The summary given in the licence application did not, however, simply re-state what is commonly known but, rather, provided the background to how the applicant had used that existing, peer-reviewed, information to inform his research and set out the basis of the programme of work. It was considered that such references would provide the applicant's rivals with valuable clues as to the specific nature of the licensees' work, to the detriment of his intellectual property rights. These points were made by the licence-holder during the discussions over what could be disclosed and accepted by the Animal Scientific Procedures Division (ASPD) of the Home Office.
35. A similar argument is applied to the complainant's comments about the scientific rationale at the Plan of Work in section 18 and also to the complainant's observation about the incomplete description of the Protocols at section 19 of the narrative, that disclosure of more detail might permit an informed reader to infer from this further matters which should remain confidential.
36. With regard to the complainant's quote from the Information Tribunal in the previous case, regarding the suggestion that the summaries set the work in a more positive light than the more neutral tone adopted in the licences themselves, the Home Office has confirmed that its intention was to put as much information into the public domain as possible, while at the same time meeting the department's obligations in terms of ASPA section 24. It accepts, however,

that such a summary can only be an accurate reflection of those aspects of the licence which can be disclosed, rather than of the licence in its entirety.

37. Having compared the summary response with the relevant sections of the licence the Commissioner agrees that the summary provided appears to be a fair representation of the licence, insofar as it reasonably communicates the material which, it has been agreed by both parties, can be disclosed.
38. It is also clear to the Commissioner that the Home Office took appropriate steps to establish what material was considered confidential by the licence holder. The Commissioner has considered the comments by Mr Justice Eady in the Appeal Court case reference [2008] EWCA Civ 870 at paragraph 30:

*"It is common ground, as we understand it, that 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 FOIA. 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."*

39. The Commissioner considers that the element highlighted is concerned with whether the public authority believes in the confidentiality of the information provided, either expressed or reasonably inferred in the circumstances. In the event, the Commissioner does not actually know the extent to which the information was expressly stated as confidential at the time of the licence application, albeit the context would strongly suggest an overarching general expectation of confidence. It is clear, however, that the Home Office has taken reasonable steps to establish the limits of such confidentiality as the licence holder considers applicable and there is nothing in the correspondence which would suggest that the level of confidentiality intended by the applicant has changed. It is accepted that the common law test of confidence is not necessary in the circumstances.
40. The public authority's refusal to disclose the requested information, under the exemption provided by section 44 of the Act, has been found to be correct. It has nevertheless sought to provide as much information as possible. The approach taken during the Commissioner's investigation was somewhat unorthodox and was done in a similar spirit of helpfulness, recognising that there is benefit and public interest in examining the integrity of a public authority's approach to its responsibilities under freedom of information legislation. In this case, it is clear that the Home Office went to considerable lengths to establish the limits of the information it was at liberty to disclose and the Commissioner wishes to commend this approach.

Right of Appeal

41. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal First-tier Tribunal (Information Rights)
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 17th day of February 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

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

Legal Annex

S.1 General right of access

Section 1(1) provides that -

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

Section 1(2) provides that -

'Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.'

S.2 Effect of Exemptions

Section 2(1) provides that –

'Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.'

S.44 Prohibitions on disclosure

Section 44(1) provides that –

'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.'

Section 44(2) provides that –

'The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).'

Animals (Scientific Procedures) Act 1986

Section 24 provides that –

24 (1)

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.

(2)

A person guilty of an offence under this Section shall be liable-

(a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both;

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.