

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2017

Public Authority: University of Bristol
Address: Senate House
Tyndall Avenue
Bristol
BS8 1TH

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the University of Bristol for details of project licences issued under the Animals (Scientific Procedures) Act 1986. The University refused to confirm or deny if the requested information was held by relying on the section 36 (effective conduct of public affairs) and section 38 (health and safety) exemptions.
2. The Commissioner's decision is that section 36(3) and section 38(2), which provide for an exclusion from the duty to confirm or deny, are not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The University shall confirm or deny to the complainant whether the requested information is held.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 4 July 2016 the complainant made a freedom of information request to the University of Bristol for information on project licences issued for animal research. The request read as follows:

1. Would you please let us know whether you hold the project licence, issued under the Animals (Scientific Procedures) Act 1986, that relates to the nontechnical summary found on page 29-31 (project 6: Prevention of Organ Injury Following Cardiac Surgery) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518518/NTS_Volume_19_Cardiovascular_Blood_and_Lymphatic_System.pdf. If so, please disclose it.

Names can be withheld, as can addresses.

2. Would you please let us know whether you hold the project licence, issued under the Animals (Scientific Procedures) Act 1986, that relates to the nontechnical summary found on pages 9-15 (project 1: Structure and function of cerebellar modules) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518538/NTS_Volume_20_Basic_Research_Nervous_System.pdf. If so, please disclose it.

Names can be withheld, as can addresses.

6. The University responded to the request on 3 August 2016 when it refused to confirm or deny if the information was held by relying on the exemptions in section 36(2)(c) (prejudice to effective conduct of public affairs) and section 38 (Health and Safety). The University also found that the public interest in maintaining the exclusion from the duty to confirm or deny outweighed the public interest in confirming or denying if the requested information was held.
7. The complainant subsequently asked the University to carry out an internal review and it presented its findings on 13 October 2016. The review upheld the initial decision to refuse to confirm or deny if the requested information was held.

Scope of the case

8. On 21 December 2016 the complainant contacted the Commissioner to complain about the way her request for information had been handled.

9. The Commissioner considers the scope of her investigation to be to consider whether the public authority was entitled to refuse to confirm or deny whether the requested information was held by relying on the section 36 and section 38 exemptions.
10. The complainant had asked that if the Commissioner were to find that the University should confirm or deny if the requested information was held, and if the information was held, then she should go on to also consider whether the requested information itself should be disclosed. However, the Commissioner's investigation must be limited to deciding whether section 36 and/or section 38 provide an exclusion from the duty to confirm or deny. To go on to consider whether any information that may be held should be disclosed would be to remove the University's right to appeal should the Commissioner find that it ought to confirm or deny.

Background

11. The Animals (Scientific Procedures) Act 1986 (ASPA) came into force on 1 January 1987 and made provision for the protection of animals used for the experimental or other scientific purposes in the United Kingdom. ASPA regulates any experimental or other scientific procedure applied to a "protected animal" that may have the effect of causing that animal pain, suffering, distress, or lasting harm.
12. ASPA requires that before any regulated procedure is carried out, it must be part of a programme specified in a project licence and carried out by a person holding an appropriate personal licence authority. In addition, work must normally be carried out at a designated scientific procedure establishment.

Reasons for decision

Section 38 – Health and Safety

13. Section 38 provides that information is exempt if disclosure would or would be likely to:
 - (a) *endanger the physical or mental health of any individual, or*
 - (b) *endanger the safety of any individual.*

14. Section 38(2) provides an exclusion from the duty to confirm or deny if requested information is held as follows:

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

15. In this case the Commissioner considers that the term 'endanger' can be interpreted in the same way as 'prejudice' in other exemptions in the Act. In order for a prejudice based exemption to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed (or if it were to confirm or deny if the information was held) has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information (or confirming or denying if it is held) and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. whether confirming or denying 'would be likely' to result in prejudice or 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

16. In this case the University has refused to confirm or deny if the requested information is held and the first thing the Commissioner would say is that when applying a neither confirm nor deny provision under any exemption, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). So, for example, if it does hold the information, the public authority isn't limited to only considering what would be revealed by confirming it has the information - it can also consider the consequences if it had to deny the information were held.

17. It is sufficient to demonstrate that either a hypothetical confirmation **or** denial would engage the exemption. So in this case, the University may

argue that the consequences of confirming that the information is held engage the exemption regardless of whether or not the information is held. Depending on the circumstances of a case it can be important to use a neither confirm nor deny response consistently, every time a certain type of information is requested, regardless of whether the information is actually held or not. Therefore, the arguments advanced by the University should not be taken to mean that the requested information is in fact held.

18. In this case the project licences referred to in the request concern research involving pigs and cats. The University has said that research on larger mammals is controversial and can arouse strong public opinion. It considers that if the requested information was held, confirming this to the complainant would endanger the mental health and wellbeing of anyone engaged in the research who would be concerned by the threat from animal rights activists. It went on to say that whilst it acknowledged that animal rights activists had not recently committed or threatened actual violence against researchers it said that all researchers in this field "work in a constant atmosphere of stress and anxiety". The University considers that disclosing a project licence, even with names and personal details redacted, could potentially allow for a researcher to be identified.
19. To successfully engage the exemption an evidential burden rests with the University to show that some causal relationship exists between confirming or denying if the information is held, and the prejudice. In the Commissioner's view the University has failed to demonstrate how this prejudice might occur or that any prejudice is "real, actual or of substance". In the Commissioner's view the University's arguments amount to little more than speculation.
20. The University's arguments appear to focus on how confirming or denying if the information is held would affect the mental health of any individual involved in the research. However, its arguments appear to go no further than suggesting that if the project licences were held, confirming this might cause distress or anxiety. The Commissioner refers to her guidance on section 38 which makes it clear that this is unlikely to be sufficient to successfully engage the exemption.

"Endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it has a greater impact than stress or worry."

A public authority may find it difficult to demonstrate a danger to mental health. They might consider obtaining an expert opinion confirming that the disclosure of the information would be likely to endanger the mental

health of the applicant or any other individual; however the Commissioner considers that clinical evidence of a psychiatric condition is not always necessary."¹

21. In reaching her decision the Commissioner has also been guided by a number of her previous decisions and appeals heard at the First Tier Tribunal. In particular the Tribunal in *Cruelty Free International v Information Commissioner* when considering the impact of disclosure of information on the mental health of staff involved in research on animals, concluded that:

*"...we cannot make positive findings that there is a likelihood of danger to someone's mental health without appropriate evidence to justify such a finding. In reality the concerns...expressed amount to nothing more than speculation based on second hand lay opinion."*²

22. In any event, the Commissioner is concerned that the University has perhaps overstated the possible consequences of confirming or denying if a particular project licence is held. In *BUAV v Information Commissioner*, the Tribunal heard evidence that the threat posed by animal rights extremists had improved significantly in recent years.³ Certainly, the University has not produced any evidence in this case to show that there is a particular threat from animal rights activists at this particular institution.

23. In that case the Tribunal also took into account research by the Understanding Animal Research Group (UAR). The UAR promotes the view that animal research is necessary for scientific understanding and medical progress. Its "Researchers' Guide to Communications" advises that the risk from opponents to animal research is minimised by the adoption of a more open and proactive approach to communicating with the public. In that case the Tribunal found the UAR's evidence persuasive when deciding that section 38 did not apply to project licence information.⁴

24. The Commissioner is also mindful that many academics involved in research on animals, both at this institution and elsewhere, routinely

¹ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

² *Cruelty Free International v Information Commissioner & Imperial College London* [EA/2015/0273], para. 30.

³ *British Union for the Abolition of Vivisection v Information Commissioner & Newcastle University* [EA/2010/0064], para. 43.

⁴ *Ibid.* paras 40 and 48.

publish their findings in scientific journals often for peer review. The complainant has referred to a number of published articles and the Commissioner has confirmed that these reveal considerable information about the extent of animal research at the University including research involving large mammals. Given that such information also includes the names of academics involved this suggests that staff members themselves do not perceive any real risk from their public association with their research. Again, all this leads the Commissioner to conclude that the potential consequences of confirming or denying whether it holds the project licences referred to in the request have been overstated.

25. For all these reasons the Commissioner has decided that the exclusion from the duty to confirm or deny under section 38(3) is not engaged.

Section 36 – prejudice to effective conduct of public affairs

26. Section 36(2)(c) provides that information is exempt if in the reasonable opinion of the qualified person disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
27. Section 36(3) provides that the duty to confirm or deny does not arise in relation to information to which this exemption applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of the qualified person, compliance with section 1(1)(a) would or would be likely to have any of the effects mentioned in section 36(2).
28. This exemption can only apply once the qualified person for the public authority has given their opinion. In this case the University has provided the Commissioner with a copy of a submission which confirms that the proper qualified person for the University, its Vice-Chancellor, gave their opinion that to confirm or deny would prejudice the effective conduct of public affairs on 28 July 2016.
29. Having satisfied herself that the University has obtained the opinion of the qualified person, in order to determine whether the exemption is engaged the Commissioner must then go on to decide whether this opinion is reasonable. This involves considering:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.

30. In considering the nature of the prejudice under section 36(2)(c) the Commissioner follows the approach of the Tribunal in *McIntyre v Information Commissioner* in that the prejudice claimed must be distinct to the prejudice which the other exemptions in FOIA are designed to protect against:

"We take a similar view to the Commissioner that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure".⁵

31. The Tribunal here took the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption.
32. The complainant has argued that the University is not entitled to rely on section 36 to refuse to confirm or deny because its reasons for applying the exemption are essentially the same as covered under section 38; that if the requested information were held, to confirm this would lead to it being targeted by animal rights activists. The complainant suggests that the University is not entitled to rely on the exemption because the prejudice that it alleges is co-extensive with the reason it says section 38 is engaged.
33. The Commissioner has some sympathy with the complainant's argument, however, as she understands it, the University's position is that to confirm or deny would prejudice the effective conduct of public affairs by disrupting its research regardless of whether or not that disruption also endangers the physical or mental health of its staff. It is the nature of the prejudice which determines whether the exemption might apply, not what might cause that prejudice and so the Commissioner is prepared to accept that section 36(2)(c) can apply on this basis, at least in principle.
34. The Commissioner has now gone on to consider the reasonableness of the qualified person's opinion. With regard to what can be considered a

⁵ *McIntyre v Information Commissioner & the Ministry of Defence [EA/2007/0068]*, para. 25

'reasonable opinion' the Commissioner refers to her guidance on section 36 which states the following:

*"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."*⁶

35. The University has argued that if it held either of the licences, to confirm this would disrupt the University's ability to carry out research. It suggested that this could be as a result of a physical campaign against the projects at the University or harassment of staff and that this could in turn lead to a project becoming untenable.
36. The University's response does not, however, explain how such a campaign or harassment might occur nor does it offer any evidence to show that such a threat currently exists at the University. Again, the University's arguments appear to be little more than speculation and not supported by evidence. Furthermore, as the Commissioner mentioned in relation to section 38, she is also mindful that academics at the University already publish their research and the Commissioner would expect that if this had led to disruption at the University or to it being targeted by animal rights activists then it would have been able to easily provide evidence of this. On the contrary, the University has not provided any information to show that previous research projects have become "untenable" as a result of any campaign or harassment.
37. The Commissioner has considered the qualified person's opinion but finds that it fails to take into account the reduced risk from animal rights groups and is not supported by any evidence. Consequently, the Commissioner has decided that the qualified person's opinion is not reasonable and that therefore the exclusion from the duty to confirm or deny under section 36(2)(3) is not engaged.

⁶ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

Right of appeal

38. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Paul Warbrick
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Wycliffe House
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