Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0059

Information Commissioner's Ref: FS50088298

Heard at Procession House, London, EC4
On 17 and 18 December 2007

Decision Promulgated
30 January 2008

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

PAUL TAYLOR
ANNE CHAFER

BETWEEN:

British Union for Abolition of Vivisection

Appellant

And

The Information Commissioner

Respondent

Secretary of State for the Home Department

Additional Party

Representation:

For the Appellant: Daniel Alexander QC
For the Respondent: Akhlaq Choudhury
For the Additional Party: Karen Steyn

Decision

The Tribunal allows the appeal in part and directs the Home Office to reconsider its assessment of the disputed information, in the light of the Tribunal's interpretation of section 44 of the Freedom of Information Act, (when read in conjunction with section 24 of the Animals (Scientific Procedures) Act 1986), and its guidance as to the appropriate procedures to follow under those provisions. The Tribunal further directs that, once that reconsideration has taken place, the application of section 44 of the Freedom of Information Act to any of the disputed information that continues to be withheld at that stage be considered at a further hearing. That further hearing will also determine the possible application of the other exemptions relied on by the Home Office, namely those arising under sections 21, 38, 40, 41 and 43 of the Freedom of Information Act.

Reasons for Decision

Introduction

1. This is part of an Appeal brought by the British Union for the Abolition of Vivisection ("BUAV") against a refusal by the Information Commissioner to order the Home Office to disclose certain information about five animal experimentation licences. The Home Office had refused to communicate the information sought on the grounds that it was subject to several of the exemptions provided for in the Freedom of Information Act 2000 ("FOIA"). The Information Commissioner decided that the disputed information should not be released because one of those exemptions applied, namely Section 44 (disclosure prohibited under statute). He considered that it was not therefore necessary to consider whether any of the other exemptions also applied. This decision deals with just the section 44 issue and leaves the possible impact of the other exemptions to be determined at a later hearing. Reaching a decision has required us to balance the Home Office's wish to protect from publication information which it believes was passed to it in confidence against the wish of the BUAV to be provided with the information which it requires to satisfy itself that animal experimentation under the Animals (Scientific Procedures) Act 1986 ("ASPA") is being regulated with what it considers to be appropriate rigour.

2. This decision is being issued approximately three years after the date of the original request for information on which it is based. The second part of the Appeal will inevitably be determined some time after that anniversary. The Tribunal's own decision to deal with the Appeal in two separate hearings has unfortunately contributed to the overall delay in reaching a conclusion but it is extremely unfortunate that the process for dealing with the request within the Home Office took eight weeks, the internal review of that refusal a further five months and the Information Commissioner's investigation of the BUAV's complaint a further twenty one months. Even allowing for the difficulties which the Information Commissioner's office faced during the early months of the operation of the FOIA we have to record our disappointment that the first letter from the Information Commissioner to the Home Office notifying it that a complaint had been received

was not sent until almost a year after the complaint had been submitted, and his detailed investigation did not begin until a further 4 months had expired.

The request for information

3. On 17 January 2005 the Animals (Scientific Procedures) Division of the Home Office received a FOIA request from the BUAV, dated 12 January 2005. It referred to a number of abstracts of project licences granted under section 5 of ASPA which had been published on the Home Office website. The request then read:

> *"The Home Office does of course hold the project licences themselves. I would be grateful if you could let me have the actual information contained in each of the following licences (using the titles given in the abstracts):*
>
> - *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"*

4. On 15 March 2005 Dr Jon Richmond, then, as now, the Head of the Animals Scientific Procedures Division, wrote to the BUAV in response to its request for information. He set out in a schedule to his letter additional information on each project, which had not been included in the corresponding abstract. The letter explained that, beyond that information, the Home Office considered that a number of the exemptions set out in the FOIA applied to the licences and that disclosure of additional information was therefore refused. The exemptions relied on were section 21 (information accessible by other means), section 38 (health and safety), section 40 (personal information), section 41 (information provided in confidence), section 43 (commercial interests) and section 44 (prohibition on disclosure). The essence of that response was maintained when, following a request for internal review, Mr Stephen Sowerby of the Home Office Information Policy Team wrote to the BUAV on 10 August 2005. However, Mr Sowerby did agree at that stage that

some of the conditions attached by the Home Office to one of the licences should also be disclosed. In all other respects the request was refused.

5. The background to the request is that the Home Office has responsibility for advising the Secretary of State on, among other matters, the grant or refusal of licences under ASPA permitting the use of animals for experimental or other scientific procedures that may have the effect of causing the animal pain, suffering, distress or lasting harm. Before any such procedure may be carried out the individual or organisation planning it must disclose fully the overall aim of the programme, a detailed plan of the work proposed, the specific scientific objectives, how they will be achieved, the species (and number) of animals to be used, the procedures to be applied to them and the adverse effects, severity limits, and ultimate fate of the animals. This disclosure is recorded in an application for a project licence, which must also demonstrate:

    a. that there are no scientifically suitable alternatives that might replace animal use, reduce the number of animals subjected to the procedure or enable it to be conducted in a manner that causes less suffering; and

    b. the likely benefits (to humans, other animals or the environment) that must be weighed against the likely welfare costs to the animals involved.

    If an application is successful the licence granted takes the form of a covering letter to which the application form is attached as a schedule. The covering letter stipulates that the licence grants authority for the work specified in the schedule. It may also provide that the licence is subject to other conditions which the Home Office may impose. These comprise a set of standard conditions and in some cases additional specific conditions are also applied. The BUAV request therefore applied to the "actual information" set out in each of the application forms that led to the grant of the five licences which it identified.

6. In December 2004, shortly before the FOIA came into force, the Home Office wrote to licence holders proposing that anonymised abstracts of granted project licences should in future be published on the Home Office website. We were told that this reflected the publicly stated wishes of Ministers to be as open as possible in order to foster informed debate about the use of animals in science. The letter went on to

explain that the Home Office had worked with a number of licence holders in preparing abstracts that, upon publication, might serve as examples for others to follow in the future. In evidence before us it was explained that this work had taken the form of a workshop exercise in which certain licence holders and Home Office officials had co-operated in an attempt to balance freedom of information considerations against the wishes of the scientific community to apply legitimate restrictions on disclosure of sensitive material. The perceived sensitivity arose from a concern that the release of information might enable animal right extremists to target individuals or premises where experimentation was being conducted as well as a wish to protect commercial or scientific secrets from competitors. Following that exercise all those applying for a licence have been asked to include an abstract with their application form, but they have not been forced to do so and a few have declined. The abstracts that are provided are then published on the Home Office website.

7. The five abstracts referred to in the BUAV request were among the first nine abstracts to be published in this way and all resulted from the workshop exercise, although we were told in evidence that the final form in each case was determined by the licence applicant without Home Office involvement. In each case the abstract did not name the applicant or identify the premises at which the licensed processes were intended to be performed. It bore a title that was different from the title of the project identified on the application form; it was expressed in less scientific language and was in most cases less specific. It then set out, in narrative form, a summary of the applicant's previous work which had led it to propose the project in question, the purpose of that project and the experimental procedures that it intended to carry out. The information summarised in this way appears in the application form in a total of twenty sections, each one responding to prompts or questions on the printed form about a particular element of the application. The sections towards the front of the form relate to the identity and experience of those who it is proposed will carry out the project and the premises at which the work will be conducted. Three key sections then follow. Part 17 of the application form calls for detailed information on the background of the proposed work and the objectives that it is hoped to achieve. The scientific literature supporting the responses given is also to be listed. Part 18 then calls for a plan of the proposed work, summarising

each experiment and the sequence in which experiments are to be performed, if there is more than one, and the links between them. Section 19 then requires the applicant to provide a description of the protocol to be followed on each experiment including information on the animals to be used. This is required to specify, where appropriate, both the species and the precise type of animal which, as a result of either a breeding programme or genetic intervention, possesses characteristics that make it suitable for the intended experiments.

8. We comment in more detail on the detailed information set out in the Licence applications in the confidential schedule to this Decision referred to below. We only add, in this open part of our Decision, that the abstracts appear generally to adopt a style and tone intended to persuade the reader as to the value of the proposed experiments. This is in contrast to the style of the licence applications, which are more neutral in tone. This perception of a positive spin having been applied to the published information was increased by the absence from the abstracts of the detail about the experiments themselves. The continuous narrative form of an abstract also made it more difficult for us to correlate particular passages to the equivalent information provided, in more structured form, in the Licence application to which it related. We return to this point in paragraph 32 (b) below.

The complaint to the Information Commissioner

9. On 6 September 2005 BUAV complained to the Information Commissioner about the manner in which the Home Office had handled its request for information. In his Decision Notice issued of 12 June 2007 the Information Commissioner decided that the Home Office had reasonable grounds for believing that the information contained in each licence, not already published in an abstract, had been provided by the applicant with an expectation of confidentiality. He considered that this brought into play section 24(1) of ASPA, which reads as follows:

> *"A person is guilty of an offence if otherwise than for the purposes 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"*

The Information Commissioner concluded that the information had been obtained in the exercise of the Home Office's function under ASPA, that disclosure to BUAV would not represent the discharge of any such function and that it knew or had reasonable grounds for believing that it had been provided in confidence. He considered that section 24 would therefore apply to the disclosure of the information requested by BUAV and that this in turn triggered the application of the absolute exemption set out in FOIA section 44. The relevant part of that section reads:

> *"(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"*

In the course of reaching that decision the Information Commissioner recorded that the additional information disclosed under cover of the letters from Dr Richmond and Mr Sowerby referred to in paragraph 4 had not been considered by the Home Office to be confidential as it was general in nature and limited to certain facts that it did not consider were covered by the exemption. The Information Commissioner concluded that, as all the rest of the requested information was covered by section 44, there was no need for him to investigate whether any of the other exemptions on which the Home Office relied were also engaged.

The appeal to the Tribunal

10. On 5 July 2007 BUAV launched an appeal to this Tribunal under FOIA section 57. The Grounds of Appeal challenged the Information Commissioner's conclusion that the information in dispute fell within section 24 of ASPA and that the Home Office had fulfilled its obligations under FOIA by making the abstracts available to the public and disclosing to BUAV the additional information referred to above. Under section 58 FOIA the Tribunal is required to determine whether the Decision Notice is in accordance with the law and, in doing so it may review any finding of fact on which it was based.

11. An Order was made joining the Home Office as a party to the Appeal on 3 September 2007 and directions were given, following a pre hearing review, on 12 September 2007. The Appeal proceeded to a hearing on 17 and 18 December

2007 on the basis that only the section 44 FOIA exemption would be dealt with. The Tribunal considered that, if it were to find that the section 44 exemption did not apply to all or some of the information in dispute, and it became necessary to consider the other exemptions not covered by the Decision Notice, further enquiries might be needed to be directed before it could determine those issues. Witness statements were provided by Ms Michelle Thew on behalf of the BUAV and Dr J Richmond, on behalf of the Home Office. Both witnesses were cross examined during the hearing. In the case of Dr Richmond part of that cross examination took place during a closed session, which enabled the Tribunal panel to ask questions about the detailed content of the Licence applications without putting confidentiality at risk before a decision had been made on the point.

The questions for the Tribunal

12. The section 44 exemption will obviously not apply unless the withheld information falls within section 24 ASPA. There is no dispute that the information contained in the licences was obtained by the Home Office in the exercise of its functions under ASPA and that disclosure of the withheld information would not be for the purposes of discharging its functions under that statute. However there is disagreement on whether the confidentiality requirement in section 24 is satisfied. The BUAV argues that the only information protected by the section is information whose disclosure would constitute the tort of breach of confidence. It is common ground that, if that is correct, the following three part test, (derived from the leading case of *Coco v AN Clark* [1969] RPC 41), must be applied:

    a. Does the information in question have the necessary quality of confidence?

    b. If so, was it disclosed in circumstances that gave rise to an obligation to maintain its confidentiality?

    c. Would its disclosure in breach of that obligation cause harm to the person who made the original, confidential, disclosure

    However the Home Office and the Information Commissioner say that this is not the appropriate test to apply. They argue that the words "*…knows or has reasonable grounds for believing to have been given in confidence"* in section 24 ASPA import

only the second of the *Coco v Clark* tests and that there is no need to establish that the information was at the time inherently worthy of protection or that its disclosure would in fact cause harm to the provider. They also argue that if, contrary to their primary argument, it is necessary for all three elements of the *Coco v Clark* test to be satisfied, then the withheld information still falls within the section 24 prohibition because it does have the necessary quality of confidence and its disclosure would cause harm to the licence holders.

13. It is common ground between the parties that, if section 24 does import the law on breach of confidence, we must consider whether any claim under that law could be met with an argument that the public interest in disclosure outweighs the public interest in maintaining the confidentiality of the information in question. This is because there is a well established public interest defence available to those facing a claim for breach of confidence. It is similar, but not identical, to the public interest balance that must be applied under FOIA section 2(2)(b) once a qualified exemption has been found to apply to particular information. In that case there is a presumption in favour of disclosure, whereas in the case of a breach of confidence claim the presumption is in favour of protecting an individual's confidential information.

14. We will deal with each of those arguments in turn.

Does section 24 ASPA import the law on breach of confidence?

15. The Home Office invited us to contrast the language of section 24 ("…reasonable grounds for believing to have been given in confidence") with the language of FOIA section 41 ("…disclosure… would constitute a breach of confidence actionable by…") and to conclude that when Parliament wished to include a requirement of an actionable breach of confidence it said so in clear terms. It argued that this demonstrates that it was not Parliament's intention to require a prosecutor under ASPA to establish an actionable duty of confidence. It said that, if it had, some of the information which an applicant was required to disclose from, for example, an early stage of a research programme, might be too imprecise for it to form the basis for a successful prosecution, given the standard of proof that would be applied in those circumstances. The requirement to prove detriment would also create further

difficulty for the prosecutor, which it said had not been the intention of the legislation. Against that the BUAV's case was that Parliament's clear intention when enacting section 24 ASPA had been to incorporate the law of confidence (including all of the *Coco v Clark* tests) and that, if this was not the case, it would be possible for an applicant for a licence simply to assert that all of the information in its application form was confidential and, in that way, effectively avoid disclosure by the Home Office under FOIA.

16. On this issue we prefer the BUAV's arguments. We think that, even though section 24 ASPA does not make specific reference to the law of confidence, the use of the phrase "*given in confidence*" means that the information in question was entitled to protection under that law – it means that it was given in circumstances where, because of the nature of the information, the circumstances of the disclosure and the harm likely to result from disclosure, the person receiving the licence application had a legally enforceable obligation to keep it confidential. The effect of the Home Office's argument would be that the threshold for criminal liability in this area would be lower than that for civil liability. That would be a remarkable outcome and we do not believe that it can be right.

17. The importing of the law of confidence in this way has the advantage that it provides a set of well established rules, based on case law, to be applied by a public authority when assessing information. We think that this is greatly preferable to the alternative, under which the test to be applied by the public authority would be very imprecise. The problems likely to be faced by a public authority in those circumstances are highlighted by the inconsistency we see between the interpretation which the Home Office has urged us to apply and the manner in which it has itself treated the BUAV request. If it were right that the only test to be applied was whether the information had been passed to the Home Office in circumstances that were capable of giving rise to an obligation of confidence, then it would not be necessary, or appropriate, for it to make any separation between disclosable and non-disclosable information. Yet that is what it has done in conceding that not all the information contained in the licence applications may be withheld. In releasing additional information, in the circumstances described in

paragraph 4 above it has evidently applied criteria based on the nature of the information and not just the circumstances on which it was disclosed to it.

18. Our interpretation of section 24 is supported by its legislative history. In the course of the House of Lords' consideration of a particular amendment to the clause that became section 24, Viscount Davidson, the Home Office minister responsible for the passage of the bill through the House of Lords said this:

> *"This is not a provision which is intended to apply to every word uttered, every fact acquired. People will of course be expected to behave with decorum and a due sense of discretion. But only when information is given on a specific in-confidence basis will the rigours of Clause 24 be relevant…"*

We believe that this demonstrates that the first two elements of the *Coco v Clark* test were intended to be incorporated. In a subsequent passage Viscount Davidson effectively reinforced the applicability of the first test (quality of confidence) and asserted that the third test (detriment) would also apply when he said:

> "…*the major concern, and the one which promoted inclusion of the clause in the Bill, is that commercially valuable material will be obtained by rival organisations or individuals…"*

19. It follows from our conclusion on this point that the Home Office, on receiving the request for information about the licence applications, should have withheld from disclosure only those elements of the information it contained which were protected by the law of confidence. We think that the circumstances in which the information had been provided to the Home Office were clearly capable of giving rise to an obligation of confidence, so that the second element of the *Coco v Clark* test was clearly satisfied. As to the third element we think that it will almost certainly follow in cases of this type that the disclosure of information from a licence application which satisfies the first element will constitute a commercial or technical secret the disclosure of which would cause the applicant harm. The Home Office would therefore have been entitled to concentrate principally, if not solely, on establishing whether any of the withheld information possessed the necessary quality of confidence.

20. We are aware of the practical consequences that follow from our decision on this point. In future cases the scientifically qualified personnel within the Home Office are likely to be able to review the relevant material more quickly than we were able to do, even though we had the assistance of Dr Richmond, but the time taken might well be extended if the licence applicant's own assertions as to confidentiality have to be evaluated. 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. The impact of the argument was, in any event, lessened on the facts of this Appeal, by the time taken to respond to the original request and to carry out the subsequent review of the original refusal.

Is the withheld information in fact entitled to protection under the law of confidence?

21. We have not been able to reach a final determination on which specific elements of the withheld information, if any, constitute confidential information, judged against the criteria set out in paragraphs 15 to 19 above. Although we spent some considerable time reviewing the licence applications in question and trying to compare the information they contained with the information disclosed in the abstracts, this did not enable us to differentiate all elements of information that were protected by the law of confidence at the time when the Home Office refused disclosure from those that were not. However, we are able to say that the Home Office did not, in our view, carry out the required level of review in this case. We base that conclusion on two factors.

22. First, we found a number of examples of specific information which do not appear in the abstracts but did not appear to be confidential information, applying the test required by the law of confidence. We identified these, as examples and not by any means as an exhaustive list, on the basis of our questioning of Dr Richmond in closed session during the hearing. Accordingly, a detailed explanation of them is set out in a confidential schedule to this decision. The schedule is to remain

confidential until this Appeal has been concluded and either the time for launching an appeal against it has expired or, in the event that an appeal is launched, the appeal has been abandoned or determined.

23. The second factor on which we base this part of our decision is the process which the Home Office carried out when responding to the original request, as explained to us in its own evidence. As stated above some of its staff had reviewed each of the licence applications in question with the applicants in the course of workshop sessions. These had the entirely laudable aim of helping all applicants to accept that the blanket confidentiality restriction which had existed in the past would not apply in future and that a balance would have to be struck between the public disclosure of information on animal experiments and legitimate control of commercial secrets. We accept the evidence of Dr Richmond that the Home Office supports freedom of information principles in this area and that it has tried hard to strike an appropriate balance with applicants, both in the course of workshops before the FOIA came into force and in its dealings with applicants since. However, we do not accept that the disclosure of just the information which the applicants themselves decided should be included in the published abstracts involved in this Appeal (albeit influenced by their discussions with Home Office officials during the workshop) satisfied the obligations imposed on a public authority by the FOIA.

24. As it applies to the facts of this case FOIA Section 1(1)(b) required the Home Office to disclose information unless permitted to withhold it under section 2(2)(a), on the ground that it was covered by the absolute exemption set out in section 44. The interplay of those provisions imposed on it an obligation to consider which elements of the information set out in each licence application were protected from disclosure by an obligation of confidence.

25. We are not satisfied that this exercise was carried out with appropriate rigour, even though it did lead to some further information being disclosed by Dr Richmond and Mr Sowerby in the course of considering the BUAV's original request. During cross examination Dr Richmond explained that the Home Office considered that it had acquired sufficient information from its co-operation with the licence applicants during the workshop sessions to enable it to judge their likely attitude to particular

elements of information. For this reason, and because of the time constraint imposed by the 20 working day time limit, it did not seek the views of individual applicants on what information each considered to be confidential, let alone challenge any claim to confidentiality that may have been asserted. Although the general attitude of Dr Richmond and his staff was therefore consistent with freedom of information principles we do not think that the procedure it followed in assessing whether the information in dispute should have been disclosed was in accordance with the FOIA.

26. We therefore conclude that not all of the withheld information is protected by an obligation of confidence owed to the licence applicants. We set out in paragraph 30 below what steps require to be taken to remedy the position, in consequence of that decision and our decision on the availability of a public interest defence.

Would a public interest defence be available to defeat a claim for breach of confidence?

27. A defendant in a claim for breach of confidence may be able to rely on a public interest defence. This has been established in the case law on breach of confidence and reinforced by Article 10 of the European Convention on Human Rights, as applied by the Court of Appeal in *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491. The existence of such a defence was not challenged before us but we heard argument as to whether the facts would have supported such a defence. The BUAV has an obvious interest in monitoring the conduct of animal research and the way in which the Home Office regulates that activity. It considers that as much information about animal experiments should be in the public domain as possible, particularly in relation to the procedures to which animals are exposed, the benefit that may be said to be derived from those procedures and the availability of non-animal alternatives.

28. The Home Office recognises that the public has a legitimate interest in animal experimentation and the regulatory system applied to it under ASPA. However, it has argued before us that these considerations did not outweigh the public interest in maintaining confidentiality. It relied, in particular, on:

a. The risk of animal right extremists identifying individuals or establishments involved in the experimentation proposed in a licence application and targeting them for harassment or physical harm.

It was not suggested that the BUAV had anything to do with this type of activity. The fact that it is relied on in support of the Home Office's refusal to disclose information is an eloquent indication of the harm that it is capable of doing to the objectives of legitimate campaigning groups. However, it is well established that disclosure to one FOIA requestor operates as disclosure to the world and, although the BUAV sought to persuade us that illegal activities against those involved in animal experiments is not as extensive or serious as the media may suggest, we are satisfied that it is a material factor that we should take into account.

The BUAV has made it clear that it does not require the names of either individuals or premises but the Home Office argued that the disclosure of more technical information than appears in the abstracts will enable them to be quite easily identified. Dr Richmond explained in his evidence that an internet search using a standard public search engine, and having the full title of the licence as its search term (as opposed to the simplified title of the corresponding abstract), in most cases listed the applicant among the first ten "hits" it identified. He also explained that disclosure of the bibliography incorporated into the licence application in support of the proposed experimentation would also enable the individuals involved to be identified because, not surprisingly, a proposal frequently develops from earlier research, with the result that those involved with the proposal also feature largely among the authors identified in the bibliography.

We think that this demonstrates that it is already relatively easy to identify, from publicly available information, the individuals and organisations that are prominent in a particular area of research and have used animals in experiments in the past. We are not convinced that the disclosure of the bibliography or the full title of the licence application will therefore increase significantly the risk that those working in this area face from extremists. We think that there is even less risk likely to arise from the disclosure of

information about the purposes, processes and impact on animals involved in a particular programme of experiments beyond that set out in the abstracts. However, we can only be certain on that point when we see the exact content of any additional information that is found to fall outside the section 24 prohibition, following the review that we have directed the Home Office to undertake under paragraph 30 below.

b. The risk of commercial or technical information being made available to competitors, thereby denying the licence applicant of a legitimate advantage generated by its own research efforts.

We believe that the need to protect an applicant from this type of potential damage is a powerful reason for withholding information. We can say, without disclosing confidential elements of information, that Dr Richmond explained how information on matters that might appear to be relatively anodyne, such as the specific type of animal to be used or the precise sequence of proposed experiments, might well be of great value to a competitor, particularly when linked with one another and with a general description of a programme's overall purpose. However, it is not possible to make a public interest judgment on the basis of generalisation. It is necessary to consider each specific piece of information that is claimed or found to be confidential. The harm the applicant is likely to suffer by disclosure must then be weighed against the contribution disclosure may make to the public debate on particular aspects of either the proposed experimentation or the manner in which it is being regulated.

Although, therefore, there would need to be powerful reasons for concluding that the applicant's right to confidentiality in respect of this type of information should be overridden by public interest in disclosure, it is not possible to reach a final determination on the point until the exercise outlined in paragraph 30 below has been completed.

c. Disclosure might lead research organisations to move their operations to a country where confidential information was more securely protected.

The Home Office suggested that two consequences might flow from this. First, a detrimental effect on the UK science base, which is considered vital for its future economic progress. Secondly, animal experimentation may thereafter be conducted in countries with a lower animal welfare standard.

While we do not dismiss either of these possibilities, we believe that they should carry significantly less weight than those already considered, when the detailed analysis comes to be performed.

Some practical consequences of our decision.

29. 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. In the course of the hearing we spent over half a day reviewing, in closed session with Dr Richmond, the licence applications involved in this Appeal, two of them in some detail. In that time we were able to obtain sufficient understanding of the subject matter to enable us to reach our conclusion that the Home Office had not complied with FOIA section 1 in response to the BUAV request. However, 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. It may be tempting, in those circumstances, to apply a broad categorisation to the content of a licence application, and to proceed on the basis, for example, that all experimental protocols are confidential. However, we do not believe that this would justify departing from our clear conclusion as to the effect of section 24 ASPA and section 44 FOIA. The information must be examined, in the same way that it would be in a civil claim for breach of confidence, and its status determined, element by element.

30. We accordingly direct that the Home Office re-examine the information in dispute and identify which specific elements of each licence application would have been protected by the law of confidence, as encapsulated in the *Coco v Clark* test, at the date of the original refusal to disclose. The timetable for this exercise, and for the next stages of the Appeal, will be determined in a further pre hearing review to be fixed as soon as possible after the date on which this Decision is promulgated. We

envisage that the directions to be made at that stage will provide that, once the results of the Home Office re-examination have been made available to the Tribunal and the Information Commissioner (and, to the extent possible, the BUAV), a further hearing will be fixed at which all of the other exemptions originally raised by the Home Office will also be considered.

31. It is to be hoped that the conclusions we have reached on the interpretation of section 24 ASPA will reduce the need to spend time on either section 41 or section 43 of the FOIA and that our comments on the risk to individuals, additional to that already caused by public domain material, will also enable the time to be spent on FOIA section 38 to be reduced.

32. We wish to make the following comments on procedural matters, which may be relevant to the next stage of this Appeal or to future appeals involving similar subject matter:

    a. It might have been possible to come closer to a decision on the application of the exemption to the facts of this case if some or all of the BUAV's legal team had been permitted to participate in the closed session, on appropriate terms as to confidentiality. Even then, it is conceivable that to be of real value the legal representatives would have required the assistance of their own technical expert, who would also have been subject to a confidentiality undertaking. This is a procedure that is not uncommon in litigation involving technical content and we think, with the benefit of hindsight, that it might have been of assistance in this case, although it would certainly have added to the length, complexity and cost of the Appeal. We think that it is a procedure that is at least worth considering if similar circumstances arise on future appeals.

    b. It might also have assisted us if the licence applications had been disclosed to the BUAV in redacted form as it would then have been clearer exactly what information had been withheld, as well as its precise context. Dr Richmond's witness statement, reaffirmed in answer to a question from the panel, was that an attempt to disclose material in redacted format under the voluntary scheme which existed under the Code of Practice on Access to

Government Information, before the FOIA came into force, had not been a success because it presented disjointed information. We respect Dr Richmond's views, in light of his direct experience of the redaction process, and acknowledge that the FOIA does not, of course, impose on public authorities an obligation to disclose documents. The Statute applies to the information that the public authority holds and, apart from a detailed provision (in section 11) about the means by which such information may be communicated (which has no application to the facts of this Appeal) does not specify how information should be disclosed. We did not therefore accept the argument, which was put to us by Mr Alexander QC on behalf of BUAV, that a public authority does not discharge its duty under FOIA section 1(1)(b) by providing a summary of the information it holds. That is too broad a statement of the law. There may be occasions where a summary or other form of restating information will be sufficient to fulfil the public authority's obligations. However Mr Alexander's argument does gain strength from the particular facts of this case where the request was for the "actual information" contained in the licence applications, identified by reference to the published abstract of each. In our view this makes it more difficult to argue that a summary will be sufficient, but still does not rule out the possibility that it might be. Whether it is or not will depend on whether it is found, on review, to have the effect of communicating to the person who made the request, the essence of the information sought, after removing any that is protected by the law of confidence. What is important is therefore the effect of a purported disclosure, not its form. We nevertheless comment that, where the information requested must be extracted from a long and complex document containing both confidential and public domain information, the task of assessing the extent to which any exemption based on confidentiality may apply is likely to be made much easier if the original may be inspected in redacted form. It may be, of course, that the cost of providing information in this form will cause the cost limit imposed by FOIA section 12 to be exceeded. However that factor does not affect the obligation to disclose; it simply gives rise to the possibility of the obligation being overridden by the section 12 exception.

c. There may be value in future in issuing a Joinder Notice against the organisations who submitted the licence applications under consideration. It is their claim to confidentiality that must be assessed (on our interpretation of the law) and having them make their own case on the issue may ultimately save time and costs even though it appears, at first glance, to complicate the procedure. Even if it did not simplify matters (for example, by enabling the public authority and the Information Commissioner to play a smaller role) the possible release of cutting edge scientific secrets, not to mention the risk to the public authority of civil or (in this case) criminal liability, may be sufficient justification for occasionally departing from the Tribunal's normal stance of seeking to reduce procedural complications.

Deputy Chairman

Chris Ryan Date 30 January 2008