

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 June 2010

Public Authority: The Open University
Address: Walton Hall
Milton Keynes
MK7 6AA

Summary

The complainant made a number of requests under the Freedom of Information Act 2000 (the 'Act') to the Open University (the "University") for information relating to the use of animals and animal material at the University. The University responded to the requests, however the complainant is dissatisfied with the responses he received to requests 2, 4, and 10. The University refused to provide the information it held relevant to requests 2 and 4 as it stated that section 38 and section 43(2) exemptions were applicable. In relation to request 10 the University provided information to the complainant which it believed answered the request however the complainant required a further detailed breakdown of this information. The University explained that this more detailed information was not held under section 1(1)(a) of the Act. The Commissioner considers that the University correctly applied section 38 of the Act to requests 2 and 4. In relation to request 10 the Commissioner considers that the information is not held under section 1(1)(a) of the 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.

The Request

2. Some time immediately prior to or on 13 February 2009 the complainant made a number of requests to the University for various pieces of information numbered 1 to 23. This investigation focuses upon the requests numbered 2, 4, and 10 which were as follows:
 - (2) where these animals [used for education and research] are sourced from;
 - (4) where this tissue/material [animal tissue and animal material used for education and research] is sourced from;
 - (10) how many and which animals are kept on Open University premises, why they are kept and in what conditions they are kept;
3. The University responded to the complainant on the 18 March 2009. In relation to requests 2 and 4 it explained that this information was exempt under sections 38 and 43 of the Act. In relation to request 10 the University provided a small amount of information but explained that most was exempt under section 38 of the Act.
4. On 18 March 2009 the complainant asked the University to carry out an internal review. The University responded on 23 April 2009. In relation to requests 2 and 4 the University upheld its application of section 38 and section 43 of the Act. The University did not respond further in relation to request 10.

The Investigation

Scope of the case

5. On 1 May 2009 the complainant submitted a complaint to the Commissioner about the University's handling of the requests. During the course of the Commissioner's investigation the scope of the complaint was refined to requests 2, 4, and 10. In relation

to request 10 the complainant clarified in his letter of 10 March 2010 that his issue regarding the University's response to request 10 solely related to his question about the number and type of animals kept on the University's premises as explained in paragraph 9 below. The Commissioner's investigation has therefore focussed upon these specific points.

Chronology

6. On 7 August 2009 the Commissioner wrote to the University to ask for its submissions in relation to its application of the various exemptions and its general handling of the requests.
7. On 29 September 2009 the University responded to the Commissioner. In relation to requests 2 and 4 it provided detailed submissions in support of its application of section 38 and 43. In relation to point 10 of the request it explained it had not realised that the complainant had wished it to conduct an internal review on this request and therefore it wanted the opportunity to do this. It stated that it would conduct an internal review in relation to request 10.
8. On 1 March 2010, the University wrote to the complainant with the result of the internal review it had carried out in relation to request 10. It explained that it had now provided the complainant with the number of different types of animals used for research purposes for the years 2005, 2006, 2007, 2008 and 2009. In relation to the numbers of animals kept on premises, it explained that this varies over time from week to week, and it was unable to locate this information. It finally provided the complainant with a link to Home Office Regulations which sets out how animals must be kept for research purposes, thus answering the 'how' animals are kept element of question 10 of the complainant's request. It stated that the University complied with the Home Office Regulations.
9. On 10 March 2010 the complainant confirmed that he remained dissatisfied with University's response in relation to request 10. He specifically expressed his surprise that the University genuinely does not know the type and number of each type of animal used and killed within, say, a year. The Commissioner has therefore focused this aspect of his investigation solely on this part of request 10, in particular as to whether it held any more detailed breakdown other than that provided to him

10. On 11 March 2010 the Commissioner wrote to the University to ask it to confirm whether or not the more detailed breakdown of information which the complainant required in relation to request 10 was held.
11. On 8 April 2010 the University responded to the Commissioner. It confirmed that the more detailed breakdown of information required by the complainant in relation to request 10 was not held. It provided its submissions in support of this.

Analysis

Requests 2 and 4

Exemptions

Section 38(1)(a) and (b) – health and safety

12. Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to –
 - (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual.”
13. The Tribunal, in the case of Hogan v Information Commissioner and Oxford City Council (EA/2005/0030), explained that the application of the ‘prejudice’ test involved a number of steps: “first, there is a need to identify the applicable interest(s) within the relevant exemption...second, the nature of the ‘prejudice’ being claimed must be considered...a third step for the decision-maker concerns the likelihood of occurrence of prejudice” (paragraphs 28 to 34).

Identifying the applicable interests

14. The University explained that it considered that section 38(1)(a) and (b) were applicable in this case as disclosure could pose a

- risk of harm to the physical and mental health and the safety of the owners, employees and associates of the organisations from which animals and animal tissue/material is sourced.
15. The Commissioner has considered the University's arguments and considers it would be artificial to draw a distinction between a threat to (a) physical and mental health and (b) safety in this context. Further, the Commissioner accepts that, in this case, where individuals are under threat of attacks on their physical health, this is likely to affect their mental health. Therefore, where the Commissioner considers the exemption to be engaged, he considers both limbs of the section 38(1) exemption to apply.
 16. In relation to this approach, in *PETA v the Information Commissioner and the University of Oxford EA/2009/0076*, it stated that, "it was suggested by PETA that for the Tribunal to be satisfied that there was a danger to mental health that positive evidence from e.g. a psychiatrist as to the clinical impact of the campaign upon the mental health of those affected would be necessary. The Tribunal rejected this contention and was satisfied that the level and nature of the physical threat was sufficient that on a balance of probabilities the effect upon the mental health of those involved would go beyond stress or worry and constitute an endangerment to their mental health."

The nature of prejudice

17. The Tribunal, in the case of *Hogan*, commented that "...an evidential burden rests with the decision-maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice..." (paragraph 30).
18. In order to demonstrate that disclosure of the requested information would be likely to result in individuals' health and safety being endangered, the University provided the Commissioner with evidence of previous cases reported in the media involving targeted activities designed to harm the health and safety of individuals linked to companies which supply animals and/ or animal tissue/matter or organisations involved in animal research. It suggested that if the names of organisations from which animals and animal tissue/matter was sourced by the University, individuals associated with those organisations would be likely to be similarly targeted by animal

extremist groups which could put the health and safety of those individuals at risk.

19. When considering the application of the exemptions and the public interest test, the Commissioner must assess the circumstances that were relevant at the time of the request or at the latest by the date of compliance with sections 10 and 17 of the Act. This is in line with the decision of the Tribunal in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/0072)* (paragraph 110).
20. The articles provided to the Commissioner detailing attacks on property and individuals associated with organisations which conduct or supply animals or animal tissue/material for research all predate the request. The articles date from December 2004 to January 2009. The University would therefore have been able to take them into account when deciding, at the refusal notice or internal review stages, to withhold the information. Furthermore the articles clearly demonstrate the ongoing nature of the threat posed by animal rights extremists. The Commissioner is therefore satisfied that there is a causal link between disclosure of the names of the organisations from which animals and animal tissue/matter is sourced by the University, and the risk claimed to the health and safety of individuals associated with those organisations.

The likelihood of prejudice

21. The University has specified that it believes disclosure of the requested information would be likely to endanger the health and safety of individuals. The Tribunal, in the case of *John Connor Press Associates Limited v Information Commissioner (EA/2005/0005)* stated that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk” (paragraph 15). The Commissioner has interpreted this to mean that, in order for a public authority to satisfy him that disclosure of the requested information would be likely to endanger the health and safety of individuals, it must demonstrate that the risk of prejudice need not be more likely than not, but it must be substantially more than remote.

22. The Commissioner's duty in this case is to consider whether disclosure of the requested information would be likely to pose a risk to the health and safety of individuals associated with the organisations from which animals and animal tissue/material is sourced by the University.
23. The University has provided the Commissioner with a number of previous examples of animal extremists targeting organisations or companies which provide animals and/or animal tissue/matter for research purposes as well as organisations which conduct or are associated with such research. The University provided one particular media article relating to the 2005 closure of a guinea pig farm based in Staffordshire, which supplied animals for research purposes, after it was targeted by animal rights activists. Individuals and properties linked to the farm were targeted by animal rights activists. The article claims individuals associated with the family were threatened, animal rights protesters were also thought to be responsible for a failed arson attack on a home linked to the farm and the remains of an elderly member of the family who ran the farm were stolen from a graveyard. The article also referred to other closures of other establishments which provided animals and/or animal tissue/matter for research and establishments which conduct animal research due to similar ongoing campaigns against them by animal rights activists. Another article dated January 2009 related to attacks and threats made against individuals linked to Huntingdon Life Sciences, a Cambridgeshire-based research laboratory.
24. The Commissioner considers that the previous examples of animal rights extremists targeting individuals linked to organisations which provide animals and/or animal tissue/material and organisations which conduct research demonstrates that there is an ongoing threat posed by animal rights extremists. The Commissioner considers that there is a strong likelihood that if the names of organisations from which the University sourced animals and/or animal tissue/material, were disclosed, those organisations may similarly be targeted by animal rights extremist groups.
25. Having considered the arguments provided by the University the Commissioner is satisfied that disclosure of the information would be likely to endanger the health and safety of individuals

and therefore section 38 is engaged. The Commissioner has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

26. The University has acknowledged that an argument in favour of disclosure is that if the public were told the names of the organisations which supply animals and/or tissue/material for research, it would promote accountability and transparency. It explained that it would enable the public to be assured that appropriate standards of care are being complied with and would allow investors, suppliers and customers to decide whether to be associated with these organisations.
27. The Commissioner considers that there is a general public interest argument relating to openness and accountability, in that disclosure would inform the public of which organisations supply animals and animal tissue/matter to the University for research purposes. However the Commissioner does not consider that disclosure of the names of these organisations would provide the assurances relating to standards of care referred to by the University. The Commissioner is however aware that animal research is strictly regulated by the Home Office which goes some way to providing assurance to the public relating to the way animal research is conducted.
28. The Commissioner also recognises that there is a public interest in disclosure of information which will enable the public to enter into well-informed debate on controversial issues such as the use of animals in medical research. However again the Commissioner does not consider that disclosure of the names of organisations which supply animals and/or tissue/material to the University for research purposes would significantly further public debate on this issue.

Public interest arguments in favour of maintaining the exemption

29. The University has argued that it is in the public interest to protect the health and safety of individuals associated with organisations which supply it with animals and/or animal tissue/matter for research purposes. The Commissioner considers that protecting the health and safety of individual

members of the public, in this case individuals associated with organisations which supply the University with animals and/or animal tissue/matter, is an extremely strong public interest argument in favour of maintaining the exemption. The Commissioner has therefore given significant weight to this argument.

30. The University has also explained that another argument in favour of maintaining the exemption concerns public expenditure required to safeguard individuals at their place of work and to deal with the results of any attacks. The University has explained that the government has stated that it is committed to stamping out illegal and violent conduct by animal rights extremists and to protect those that work in the bioscience sector, either directly or in the supply chain. The University explained that in the report 'Animal Welfare – Human Rights: protecting people from animal rights extremists' (July 2004), the Prime Minister at the time described the measures that were being taken to tackle the problem of extremist activities. It explained that these measures included allocating extra public funds and resources to tackle these issues. The University therefore contends that if information about its suppliers were released into the public domain, these organisations would be at increased risk of attack and so increased protection from public funds would be required. It argued that this would not be in the public interest.
31. The Commissioner does not consider that this is a relevant public interest argument in relation to the application of section 38 and has not therefore given weight to this argument.

Balance of the public interest arguments

32. The Commissioner considers that there is a public interest in openness and accountability of organisations which conduct animal research and organisations which supply animals and animal tissue/matter, in relation to ensuring that appropriate standards of care are complied with. However the Commissioner does not consider that disclosure of the names of organisations who supply animals and/or tissue/matter to the University would meet this public interest argument. The Commissioner has therefore given less weight to this argument.
33. The Commissioner considers there is a public interest in information which would add to the debate about the use of

- animals in scientific research being made available. However, again he considers that release of the names of organisations who supply animals and/or tissue/matter to the University would not meet this public interest argument to any considerable degree. The Commissioner has therefore given less weight to this argument.
34. The Commissioner considers that the University has demonstrated that disclosure was likely to pose a risk to the health and safety of individuals associated with the organisations which supply it with animals and/or tissue/matter for research purposes. Given the severe nature of the threats and attacks which have occurred in relation to other similar organisations, the Commissioner has given substantial weight to this argument.
35. The Commissioner does not consider that disclosing the information requested in order to inform public debate and to promote accountability and transparency would justify the risk to individuals' health and safety.
36. The Commissioner's view in this case is that the public interest in maintaining the exemption outweighs the public interest in disclosure.
37. As the Commissioner has found that section 38(1)(a) and (b) was correctly engaged in this case in order to withhold the information relating to request 2 and 4 he has not gone on to consider the University's application of section 43.

Request 10

Substantive Procedural Matters

Section 1(1)

38. Section 1(1) of the Act 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.”

39. In considering this case, the Commissioner is mindful of the Tribunal’s decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072). It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner will apply in this case.
40. In discussing the application of the balance of probabilities test, the Tribunal stated that, “We think that its application requires us to consider a number of factors including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.” The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.
41. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office* (EA/2007/0110). In this case Mr Ames had requested information relating to the September 2002 “Iraq’s Weapons of Mass Destruction” dossier. The Tribunal stated that the Iraq dossier was “...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what...” However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not “...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one...” Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessarily mean that information is held.

42. In relation to request 10, the University has provided the complainant with the number of animals (broken down by types of animals) used in research at the University for the years 2005, 2006, 2007, 2008 and 2009. The complainant however wishes to obtain a more detailed breakdown than the yearly breakdown provided. The University has however confirmed that it does not hold any such recorded information, it does not hold information relating to the numbers of animals on any other regular basis.
43. The Commissioner will therefore consider whether any further detailed breakdown of this information is held by the University other than the yearly breakdown which has been provided.
44. The University has explained that there is no business purpose for it to hold the information for more regular intervals than the yearly breakdown which is held. It has explained that the University's retention policy does not refer to information of this type. The University also explained that a more frequent breakdown of the numbers of animals used for research (other than the yearly breakdown provided) has never existed and therefore has not been destroyed or deleted. It explained that the Chair of the Animal Ethics Advisory Group, the manager responsible for the Research IT, the Head of Life Sciences and the Director of Research in Life Sciences were all asked whether this more detailed breakdown of numbers of animals was held. It was confirmed that the number of animals used in research every year is recorded and that this is a requirement upon the University. This information was provided to the complainant. Further breakdowns are not held. Although the Commissioner notes that the University did not conduct a search to see if more detailed information was held he is satisfied with the University's arguments to explain why this information has never existed therefore rendering any searches unnecessary.
45. The Commissioner has considered the submissions provided by the University as well as the Tribunal decisions highlighted above. The Commissioner is mindful that the University has provided the complainant with a yearly breakdown of types and numbers of animals used for research purposes. The Commissioner considers that on the balance of probabilities a further breakdown (more frequent than the yearly breakdown provided) is not held by the University.

46. The Commissioner has come to the conclusion that the more detailed breakdown of information requested by the complainant is not held under section 1(1)(a) of the Act.

Procedural Matters

Section 10(1)

47. Section 10(1) of the Act 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.”

48. The Commissioner has considered whether or not the University complied with section 10(1) of the Act.
49. As the University did not provide information it held relevant to request 10 until it had conducted the internal review in relation to this request, it breached section 10(1). This is because this information was not provided within the statutory time for compliance.

The Decision

50. The Commissioner considers that the University correctly applied section 38(1)(a) and (b) of the Act to requests 2 and 4.
51. The Commissioner considers that the more detailed breakdown of information required in relation to request 10 is not held under section 1(1)(a) of the Act.
52. The Commissioner also considers that the University breached section 10(1) in its handling of this request.

Steps Required

53. The Commissioner requires no steps to be taken.

Other Matters

54. On the 29 September 2009, the University explained to the Commissioner that the complainant's wish for an internal review to be carried out in relation to request 10 has not been made clear to them. The authority subsequently undertook to complete an internal review in relation to this request. On the 1 March 2010, over 100 working days later, the result of the internal review was communicated to the complainant. The Commissioner wishes to take this opportunity to remind the University that he expects reviews to be completed within 20 working days. In exceptional cases it may be appropriate to take longer, but in no case should the review take more than 40 working days.

Right of Appeal

55. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 21st day of June 2010

Signed

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

Legal Annex

Freedom of Information Act 2000

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.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Health and safety.

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

Section 38(2) provides that –

“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).”