



Neutral citation number: [2024] UKFTT 863 (GRC)

Case Reference: EA/2023/0091

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Heard: by CVP**

**Heard on: 15 November 2023 and 9 August 2024**

**Decision given on: 26 September 2024**

**Before**

**TRIBUNAL JUDGE FOSS  
TRIBUNAL MEMBER TATAM  
TRIBUNAL MEMBER YATES**

**Between**

**DEBORAH COX**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER**

**(2) THE HOME OFFICE**

**Representation:**

Appellant: Represented by Adam Richardson of Counsel

First Respondent: Did not attend the hearing and was not represented

Second Respondent: Represented by Richard Evans of Counsel

**Decision:** The appeal is ALLOWED

**Substituted Decision Notice:**

The Home Office must send to the Appellant within 28 days of the date on which this decision is promulgated, a list of establishments licensed under the Animals (Scientific Procedures) Act 1986 as at 18 May 2022, which were public authorities under the Freedom of Information Act 2000, to include government departments, local authorities, NHS Trusts and hospitals, state schools, universities and police forces.

**DECISION AND REASONS**

Not all our reasons for our decision can be set out publicly, and we have issued a separate, CLOSED decision. An order has been made prohibiting the disclosure of those reasons to any person save the Commissioner, the Home Office and their respective legal representatives.

**Introduction**

1. This appeal concerns a request by the Appellant to the Home Office for the identity of public authority establishments licensed by the government to use animals for experimental or other scientific purposes.

2. The propriety of, and ethics surrounding, the use of animals for such purposes has long stimulated vigorous societal debate. That debate has extended over recent decades into a range of activities by those who are opposed to such use, or at least seek greater transparency around it: at one end, protests, letter-writing campaigns, public information stalls, and generally peaceful and lawful activities, which tend to be characterised as activism; and at the other end, illegal, and sometimes violent, activities, which tend to be characterised as extremism.
3. In the United Kingdom, the Animals (Scientific Procedures) Act 1986 (“ASP A”) provides for the protection of animals used for experimental or other scientific purposes. It was described to us by the Home Office in evidence at the hearing of this appeal as a “carve-out” from other animal welfare legislation to “enable harm” to animals in a regulated environment for the public good. Self-evidently, it significantly pre-dates the Freedom of Information Act 2000 (“FOIA”).
4. A “protected animal” within the meaning of ASP A means:
  - a. any living vertebrate<sup>1</sup> other than man and any living cephalopod (s1(1) ASP A).
  - b. any such vertebrate in its foetal, larval or embryonic form only from the state of its development when (a) in the case of a mammal, bird or reptile, two-thirds of the gestation or incubation period for the relevant species has elapsed (s1(2)(a) ASP A); and (b) in any other case, it becomes capable of independent feeding (s1(2)(b) ASP A). A living cephalopod in its embryonic form is not a protected animal (s1(2A) ASP A).
5. S1(3) ASP A gives the Secretary of State powers to extend the definition of protected animal, alter the stage of development specified in s1(2)(a) ASP A, and make provision in lieu of s1(2) ASP A as respects any animal which becomes a protected animal by virtue of an order extending the definition of protected animal under s1(3)(a) ASP A.
6. S1(4) ASP A provides that an animal shall be regarded as continuing to live until the permanent cessation of circulation or the destruction of its brain.
7. ASP A controls scientific procedures in three ways: (1) through project licences, (2) through personal licences, and (3) through certificates of designation of a place as a scientific procedure establishment. It prohibits the application of a regulated procedure to an animal without the requisite licences. Put shortly, a regulated

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<sup>1</sup> “Vertebrate” means any animal of the Sub-phylum Vertebrata of the Phylum Chordata (s1(5) ASP A).

procedure means any experimental or other scientific procedure applied to a protected animal for a qualifying purpose, which may have the effect of causing that animal pain, suffering, distress or lasting harm equivalent to, or higher than, that caused by the introduction of a needle in accordance with good veterinary practice. Qualifying purposes are experimental or other scientific purposes (whether or not the outcome of the procedure is known) or educational purposes.

## **The Request**

8. On 24 March 2022, as part of a series of correspondence with the Home Office, the Appellant requested from the Home Office a list of establishments licensed under ASPA which are public authorities for the purpose of FOIA, and the date at which that information was prepared (“the Request”).
9. On 18 May 2022, the Home Office refused the Request, in reliance on s38(1) FOIA (health and safety).
10. On 22 May 2022, the Appellant sought an internal review of the Home Office’s refusal of the Request. On 14 June 2022, the Home Office maintained its position, in reliance on s38(1)(a) and (b) FOIA.
11. On 23 June 2022 the Appellant complained to the Information Commissioner (“the Commissioner”).
12. The Commissioner investigated. On 23 January 2022, he issued a Decision Notice referenced IC-177442-Q4D0 (“the Decision Notice”) in which he concluded that the Home Office was entitled to rely on s38(1) (a) and (b) FOIA to refuse the Request.
13. The Appellant appealed the Decision Notice to the First-tier Tribunal. A hearing of the appeal took place by Cloud Video Platform on 15 November 2023. The Appellant was represented by Counsel acting pro bono. The Commissioner did not appear.
14. The Tribunal adjourned the hearing part-heard, directing that the Home Office be joined as a Respondent to the proceedings.
15. A further and final hearing took place by Cloud Video Platform on 9 August 2024, at which the Appellant and the Home Office were each represented by Counsel

(Counsel for the Appellant again acting pro bono). The Commissioner did not appear.

### **The Home Office's response to the Request**

16. On 18 May 2022, the Home Office refused the Request on the basis that the information requested was exempt from disclosure under s38(1) FOIA "for reasons of health and safety". It gave no further justification for the application of the exemption than that. It went on immediately to consider the public interest considerations for and against disclosure of the information. It said this:

"...

#### ***Considerations in favour of disclosing the information***

*The Home Office works with a presumption to openness and transparency and recognises that there is significant public interest in enabling access to information about the use of animals in science. There is also specific public interest in enabling access to information about establishments licensed under the Animals (Scientific Procedures) Act 1986 (ASPAs).*

#### ***Considerations in favour of maintaining the exemption***

*Disclosing a list of licensed establishments under ASPA 1986 that are public authorities engages section 38 because it is likely to endanger the health or safety of an individual. This is because there is a risk of potential harm to individuals associated with those organisations licensed under ASPA 1986 when information relating to the topic of this request, which is an emotive issue, is put in the public domain.*

#### ***Conclusion***

*In respect of this request, it is not considered that the countervailing considerations in favour of disclosing the information are of equal strength to those in favour of nondisclosure; they do not override the inbuilt public interest in health and safety."*

17. On 22 May 2022, the Appellant sought an internal review of the Home Office's decision. She emphasised that she was not asking for staff names or exact locations of animal research laboratories. She just wanted to know to whom she might send FOIA requests to assist her in gathering unpublished figures, for example, of animals killed without use in regulated procedures. She went on to say that she had received confirmation from sixty-one public bodies that they held relevant licences, and that she only needed the names of the remaining twenty-one. She named the sixty-one public authorities who had confirmed to her that they were licensed under ASPA.

18. On 14 June 2022, the Home Office confirmed to the Appellant that upon internal review, it found that both s38(1)(a) (physical and mental health) and s38(1)(b) (safety) were engaged. It asserted that to disclose a list of the names of licensed establishments which were public authorities could, together with other information available, lead to individuals being identifiable and therefore be likely to cause the harm envisaged by s38(1) FOIA.

### **The Commissioner's Decision Notice**

19. By the Decision Notice, the Commissioner decided that the Home Office was entitled to withhold the disputed information in reliance on s38(1)(a) and (b) FOIA. He reasoned as follows:
  - a. he acknowledged the Home Office's arguments that: while individual organisations may voluntarily publish information on their work, establishments have an expectation that their information will not be shared by the Home Office; disclosure of sites of controversial scientific research where disclosure could lead to sabotage and therefore risks to the physical safety of staff; scientific work involving animals is highly controversial and staff working at sites using animals have been, and continue to be, targeted or subject to abuse and intimidation; there was a real, evidenced risk to the physical and mental health and safety of individuals associated with licensed establishments of which the Home Office had provided the Commissioner with examples; in relation to the level of endangerment in this case the Home Office was relying on the lower level of threshold - "would be likely to endanger".
  - b. a public authority would not necessarily be able to provide evidence of a causal link between disclosure and endangerment to health and safety, because the endangerment relates to events which have not occurred. However, there must be more than a mere assertion or belief that disclosure would lead to endangerment: there must be a logical connection between the disclosure and the endangerment in order to engage the exemption.
  - c. the question of the degree of endangerment was not straightforward but the use of animals in science has been, and remains, an emotive issue.
  - d. disclosure of information under FOIA is disclosure of information to the world at large.
  - e. taking all the above into account, there was a causal relationship between the disclosure of the withheld information and the harm that s38(1)(a) and (b) were designed to protect.

- f. the public interest in maintaining the exemption outweighed the public interest in favour of disclosure:
  - i. he invariably placed significant weight on protecting individuals from risk to their physical and mental wellbeing and safety, the natural consequence of which is that disclosure under FOIA would only be justified where a compelling reason could be provided to support disclosure.
  - ii. in any such situation where disclosure would be likely to lead to endangerment to health or safety, there was a public interest in avoiding that outcome.
  - iii. disclosure under FOIA is effectively an unlimited disclosure to the world at large, without conditions. The wider public interest issues must therefore be considered when deciding whether the information requested is suitable for disclosure.
  - iv. in this case, in weighing up the risks to the health or safety of an individual or group, against the public interest in disclosure, he gave greater weight to the former, which he considered disclosure of the information would be likely to cause.

## **Notice of Appeal**

20. By her Notice of Appeal against the Decision Notice, dated 20 February 2023, the Appellant argued that the Home Office had failed to identify a causal link between disclosure and endangerment to health and safety: *“They are required to explain the scenario that would arise that would likely cause endangerment, describe the causal factors and assess how likely they are to occur. They should make a clear distinction between possibilities that are hypothetical, remote or more than 50% chance to occur and explain why. It should be possible to cite examples of harm in the past that the exemption is seeking to prevent. An expert report would be required in relation to the mental health endangerment, an expert can clearly posit on whether the risk envisaged by the [Home Office] would have the effect they seem to rely on. None of this particularity is present.”*

## **The Commissioner’s Response to the Notice of Appeal**

21. On 15 June 2023, the Commissioner responded to the Notice of Appeal, in summary, as follows:

- a. the Home Office had stated that: scientific procedures on animals and breeding animals for that purpose was highly controversial and that staff working at sites using animals had been, and continued to be, targeted for

abuse and intimidation; disclosure would be likely to present a very real risk to the health and safety of those working at the establishments in question; public identification of licensed establishments had led to targeting by extremists, who are prepared to break the law, intimidate and cause criminal damage; there was a real and evidenced risk to the physical and mental health, and safety, of those associated with licenced establishments, by reference to anonymised examples provided by the Home Office e.g.:

- i. an organisation seeking police protection and court injunction due to a recent and ongoing threat to staff safety. Workers were followed and targeted for intimidation and abuse, including at their own homes.
  - ii. between July 2021 and July 2022, more than 40 individuals had been arrested for various offences including intimidation of persons connected with animal research organisations and assault.
  - iii. more recently, there had been a break in at a site which resulted in the theft of animals and multiple arrests.
- b. based on the Home Office's submission, the threshold of likelihood of harm required by s38(1) FOIA was met. While the examples provided were anonymised, they were recent and appeared to be directly related to the risks posed to those associated with establishments licenced under ASPA. Consequently, there was a very significant and weighty chance and a real and significant risk of endangerment to the physical and/or mental health, and the safety of, individuals connected with animal research at licensed establishments.
- c. even though a licensed establishment might choose to publish information about their work, there was a general expectation on the part of such establishments that the Home Office would not identify them as licensed.
- d. he concluded that s38(1) was engaged.

22. In balancing the public interest considerations for and against maintaining the exemption, he identified that:

- a. the fact that an issue is emotive or controversial or gives rise to strong feelings is not determinative when it comes to assessing the public interest.
- b. there is a public interest in organisations in receipt of public funding being transparent as to the use of those funds, and a significant public interest in enabling access to information about the use of animals in science and, specifically, in enabling access to information about establishments licensed under ASPA.



- c. however, where disclosure would be likely to lead to endangerment to the health and/or safety of individuals involved in animal research, disclosure would only be justified where there was a compelling countervailing public interest of equal or greater weight.
23. He concluded that, in this case, avoiding endangerment to the health and/or safety of individuals involved in animal research at the relevant establishments outweighed the public interest in disclosure.
24. He invited the Tribunal to join the Home Office to the appeal, or direct that the Home Office may file evidence as a non-party, to put the Tribunal in the best possible position to assess the nature and degree of endangerment that would be likely to flow from disclosure in this case.

### **The Appellant's Reply to the Commissioner's Response to the Notice of Appeal**

25. The Appellant replied to the Commissioner's Response to the Notice of Appeal, in summary, as follows:
- a. there must be an explicitly considered threat of a specific, dangerous attack that is likely or more likely than not to occur as a result of disclosure (with an even higher bar for endangerment to mental health than for physical safety, requiring an expert report). The Home Office had produced no such evidence.
  - b. the Home Office's suggestion that it was acting consistently in withholding the information requested even where an establishment might choose to publish information about its work, was simply a construct behind which the Home Office was hiding rather than being transparent with the public regarding the nature and extent of regulated animal testing.
  - c. animal welfare and the exposure of cruelty to animals was a legitimate matter of public interest and has become increasingly so over the years.

### **Matters arising after the hearing on 15 November 2023**

26. At the hearing on 15 November 2023, the only parties to the appeal were the Appellant and the Commissioner. After the hearing, we directed that the Home Office be joined as a Respondent to the appeal. We did so, in line with our inquisitorial jurisdiction, because we considered that the Commissioner had not provided the Tribunal with sufficient evidence to support his findings that the information requested would or would be likely to endanger the physical or

mental health or safety of any individual. We considered it fair and just to join the Home Office to the appeal to obtain the best possible evidence and so that the Home Office may have a right of appeal.

27. There then followed many weeks of delay caused by the Home Office's failure to respond to directions addressed to it after its joinder. The Tribunal was compelled to issue a number of directions to the Home Office to stimulate a response. It is not necessary to rehearse the detail of that here, save only to note that the Home Office has explained, and apologised for the fact, that it had not appreciated that it had been joined as a party to the appeal and been made subject to directions.

### **Home Office Response to the Appeal**

28. On 10 July 2024, the Home Office filed an OPEN and a CLOSED witness statement and exhibit dated 10 July 2024, with an application (which the Tribunal granted) that the CLOSED witness statement be held pursuant to Rule 14(6) of the Tribunal Rules on the basis that it provided examples of the harm which could be caused by disclosure of the disputed information and would undermine the security measures referred to in that statement. The Home Office also filed: (1) an index to a CLOSED bundle (showing that the bundle contained the disputed information and the CLOSED witness statement); and (2) a gist of the CLOSED statement as *"setting out, and exhibiting evidence of, (a) details of national and local threats to individuals and other criminal acts pertaining to licensed establishments and (b) specific details of increases in security measures at licensed establishments to respond to threats."*
29. On 22 July 2024, the Tribunal contacted the Home Office to invite it to consider whether there may be scope for greater disclosure to the Appellant of parts of its evidence, or at least to provide a gist of them, in order that the Appellant may have sight before the hearing of as much material as was relied on by the Home Office as appropriate. The Home Office agreed to go so far as confirming that the opening paragraphs of the CLOSED statement replicated the introductory paragraphs of the OPEN statement and explained how the information contained in the statement had been gathered.

### **The hearing on 9 August 2024**

30. In advance of the hearing, we read the parties' skeleton arguments, the entirety of an OPEN bundle agreed by the parties, the parties' agreed bundle of authorities,

the Home Office's CLOSED bundle, and its OPEN and CLOSED witness statement and the exhibits thereto.

31. In the early part of 2024, the Appellant's Counsel had written to the Tribunal, expressing concern at the joinder of the Home Office as a Respondent. In very short order, the Appellant's concern was that it was unfair of the Tribunal to join the Home Office to the appeal, when the Home Office had initially declined to participate in the appeal; if the Tribunal was not satisfied at the CVP hearing in November 2023 that it had sufficient information from the Home Office to substantiate its position under FOIA for refusing the Request, that meant, so the Appellant submitted, that her appeal should succeed. At the start of the hearing on 9 August 2024, we ascertained from the Appellant's Counsel that the Appellant was no longer pursuing such an argument. Accordingly, we do not deal with it in this judgment.
32. The hearing on 9 August 2024 lasted a full day. At the end of the hearing, we directed that the parties should have an opportunity to file written, closing submissions. We did so to acknowledge (a) that the Home Office's agreed gist of the CLOSED session was not provided to the Appellant until relatively late in the afternoon of 9 August 2024, and (b) that the Home Office's Counsel had only been instructed a few days before the hearing, its previous Counsel having been indisposed at short notice.

### **Applicable Law/Legal Principles**

33. The relevant provisions of FOIA are as follows:

#### **Section 1**

##### *General right of access to information held by public authorities.*

- (1) *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 2**

### ***Effect of the exemptions in Part II***

...

(3) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-*

- (a) *The information is exempt information by virtue of a provision conferring absolute exemption, or*
- (b) *In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

...

## **Section 38**

### ***Health and safety.***

(1) *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 44**

### ***Prohibitions on disclosure.***

(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,*

...

## **Section 58**

### ***Determination of appeals***

- (1) *If on an appeal under section 57 the Tribunal considers-*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
  - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

34. On appeal under s58 FOIA, the Tribunal has, as its starting point, the Decision Notice, to which it should give such weight as it thinks fit in the circumstances, but it may review any finding of fact on which the Decision Notice was based. Thus, the Tribunal exercises a full merits appellate jurisdiction, making its own findings of fact and then deciding whether the relevant provisions of FOIA have been correctly applied (*Information Commissioner v Malnick* [2018] UKUT 72 (AAC)). It must decide the issues as at the date of the public authority's decision (*Montague v Information Commissioner and DIT* [2022] UKUK 104 (AAC)).

## **Analysis**

### **Section 38 FOIA**

35. S38 FOIA is a qualified exemption, so that whether or not there is a duty to disclose any exempt information will turn on whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
36. S38 FOIA is unique amongst the qualified exemptions in FOIA for its requirement that disclosure would, or would be likely to, *endanger* a protected interest as distinct from *prejudicing* a protected interest, which is the test required in the other qualified exemptions in FOIA.
37. We construe:

- a. endangerment to physical health as placing in danger the state of a person's body i.e. exposing them to risk of non-trivial harm or injury.
  - b. endangerment to mental health as placing in danger the mental state of an individual, beyond stress or worry.
38. Save in relation to one aspect of mental health, which we address below, we do not construe the reference to an "individual" as meaning that the Home Office needs to identify a named individual to demonstrate that s38 FOIA is engaged. It is sufficient, in our view, for the Home Office to identify a category or categories of individuals who may be relevantly endangered in order that the Tribunal might test the prospect of endangerment as against a putative individual in any such category.
39. In the context of mental health, we accept that in individual cases, a certain degree of stress or worry, particularly if suffered over a sustained period of time and/or depending upon any pre-existing mental condition, may endanger an individual's mental health, but in such a case, given the generally invisible intricacies of each person's mental health, we would probably require the relevant individual to be identified and medical evidence of the prospect of endangerment to their mental health.
40. We construe safety as meaning an environment in which an individual is free from danger.
41. While the exemption is directed to the consequences of disclosure, rather than the use that might be made of the information disclosed, if it is reasonably foreseeable that the information requested, once disclosed, will likely be used in such a way as to endanger the health or safety of an individual, then it may fairly be said that disclosure of the information would, or would be likely to, endanger that individual's health or safety. In such a case, disclosure would indirectly endanger an individual.
42. How reasonably foreseeable that endangerment is in any given context will determine whether there is a sufficiently close causal link between disclosure and endangerment. Evaluation of that requires assessment of (a) the content of the disputed information, (b) the source of the disputed information (so as to assess its credibility), (c) the context and circumstances of those whose health or safety is said to be, or likely to be, endangered by its disclosure, and (d) whether other information similar or identical to the information requested is publicly available.

## *The Evidence*

43. The Home Office called evidence from William Reynolds. Mr. Reynolds is Head of the Animals in Science Policy and Coordination Function (“the Policy Unit”). He has held this role since the creation of the Policy Unit in April 2022. In this role, he is accountable to the Director of Home Office Science, Home Office Chief Scientific Adviser and Ministers for policy leadership for the regulation of animals in science. Between June 2017 and April 2022, he was the Head of the Animals in Science Regulation Unit (“ASRU”) at the Home Office. In that role, he was responsible for delivering the UK regulatory framework under ASPA. Between May 2013 and June 2016, he was Head of Policy and Administration in ASRU, and from June 2016 to June 2017, he was Deputy Head of ASRU. In both roles, he was responsible, under the Head of ASRU, for administering and enforcing the scheme for licensing and regulation for the use of animals in science under ASPA.
44. Mr. Reynolds gave evidence in OPEN and CLOSED session. We found him to be a straightforward witness with substantial knowledge and experience of the policy and administration of the regulation of animals in science in the United Kingdom.
45. In his OPEN evidence, he said that the use of animals in science was a controversial issue. He explained that in recent decades, animal rights activists had taken extreme action that could cause harm to the physical and/or mental health, and/or endanger the safety, of individuals working at licensed scientific establishments. He gave three examples consisting of (1) a bomb attack thirty-four years ago on an animal researcher (2) the conviction of an animal rights activist twenty years ago for blackmailing an animal research company, and (3) the theft of a body from a grave eighteen years ago of a relative of those involved in breeding animals for research. He said that these examples illustrated the very real risk to the safety, and physical and mental health, of individuals associated with establishments using animals in science.
46. By way of more recent examples of animal rights activity impacting the health and safety of individuals at licensed establishments, he referred to what he described as a recent and ongoing example of a licensed establishment having to seek police protection and an injunction due to the threat of the safety of their staff.
47. He said this *“Between July 2021 and July 2022, 43 individuals have been arrested for 50 offences. The most common reasons for arrests are harassment, intimidation of persons connected with animal research organisations, obstruction of highway, criminal damage,*

*assault on police and common assault. This activity has continued and in December 2022 a break in at a site resulted in the theft of animals and multiple arrests (14) by police."*

48. He referred to several online Facebook posts of videos that showed protest activity and property intrusion that had necessitated significant police presence. He provided the following as examples of incidents which had been reported to the Home Office and which informed the Home Office assessment of the risk to the health and safety of individuals that could result from the release of specific information about organisations licensed under ASPA:

“

- *Regular verbal abuse of staff as they enter and exit the site, including aggressive profanity.*
- *Staff followed as they leave work.*
- *Staff car registration plates recorded and shared on social media with request to trace the owners.*
- *Targeting of staff at their family homes, with properties and vehicles vandalised and graffitied with 'scum' and 'puppy killer'.*
- *Staff receiving threatening letters at their home addresses.*
- *Verbal abuse of staff away from work.*
- *Targeting of staff with aggressive social media messages.*
- *Staff sent funeral plans, indicating threat of physical harm."*

49. He said that these matters had caused anxiety and stress for the individuals impacted and for their family members; negatively impacted their private and family relationships; and caused some to resign their employment.

50. He went on to say that the Home Office was aware of further evidence of the targeting of individuals at their own homes or workplaces by way of intimidation, including trespass, graffiti, breaking windows, and the use of smoke grenades. In that context, he exhibited to his OPEN witness statement four articles published online, all relating to a private commercial enterprise (not a public authority), responsible for the breeding of protected animals for use in science, which we shall refer to as “the Facility”:

- a. The first article was published by what we understand to be an animal rights protest group. It showed damage (a broken window, paint daub and graffiti) at the Facility’s premises in July 2022, with a comment addressed to someone by their first name (whom we understand to be the owner or director of the Facility) saying “*The secret’s out [name] everyone knows what you get up to now and it seems that decent people just aren’t prepared to put up with it*”.



- b. The second article was published by the same group. It described an attempt by activists in January 2022 to confront the Facility's owner or director at his home, naming him and his wife, giving the registration number of his car, and purportedly showing two photographs of his house; one being a view of the house from the street, with the name of the street visible; the second being a photograph of four protestors outside his house, described as having "*jumped the gate and walked up to his front door to tell him his vile business transporting animals to their deaths*" was not welcome. Two protestors are holding placards naming the Facility above the words "*Couriers of cruelty*", and two are letting off what are described as smoke grenades. On the version of the article exhibited to Mr. Reynolds' statement, it received twenty-three brief online comments from persons expressing themselves (sometimes abusively) as hostile to the Facility and its owner or director and sympathetic to the cause of those who had attempted to confront him.
  - c. The third article was published by local press in May 2022. It reported the Facility releasing what the Facility described as an image of a wall at the home of a staff member, bearing graffiti with the name of the Facility followed by the word "*scum*". It reported that a spokesperson for the Facility said that staff had been shouted at and harassed daily as they arrived and left for work, by people outside the gates of the Facility.
  - d. The fourth article was published by local press in February 2022. It reported regular protests for a month at the Facility, included photographs of what appeared to be such protest at the business' premises, and reported the protestors' claim that transportation of protected animals by the Facility had reduced or ceased since the protests began, and that an activist had been told that the director's or owner's neighbours had reported that the lights at his home were not switched on in the evenings.
51. Moving beyond the Facility, Mr. Reynolds said that the Home Office was also aware of allegations of attempts to pick the lock on an individual's family home, social media posts identifying an individual and their family, and an individual having to swerve to avoid a collision after being driven at by a known protestor.
52. He said that relevant establishments had taken steps to protect individuals, property and their businesses, and the protected animals themselves, and that he had visited many of these establishments and seen these security measures himself.
53. He concluded that the evidence available to the Home Office strongly suggested an ongoing threat to the physical or mental health and safety of individuals

associated with licensed establishments; that the Home Office took the health and safety of individuals extremely seriously and believed it was not normally appropriate to release the names of licensed establishments given the risk to individuals associated, or perceived to be associated, with any licensed establishment; the Home Office understood that some licensed establishments voluntarily chose to disclose information about their activities, which was a decision for them, having undertaken their own risk assessment.

54. After Mr. Reynolds had given his CLOSED evidence, the Home Office agreed to disclose to the Appellant the following gist of parts of his CLOSED evidence:
- a. he had not compared the list of licensed establishments provided by the Appellant with that in the disputed information.
  - b. most of the licensed establishments in the disputed information had been targeted by various means, many of them by means which had caused mental and physical harm to individuals and their business.
  - c. there was no documentary evidence in the material before the Tribunal evidencing endangering activity in relation to the licensed establishments listed in the disputed information. However, the evidence which he had presented showed activities all around the country, namely direct action by individuals.
  - d. disclosing the name of a licensed establishment would not add to much of what is already in the public domain about them, but it is a matter for the establishment in question as to whether it discloses such data.
  - e. there is a wide range of establishments at risk, with a current campaign focused on the use of dogs in science.
  - f. the Home Office obtains its information as to the targeting of licensed establishments in the disputed information from the Home Office Public Order Unit, the local Police Unit, the National Police Coordination Centre, and the establishments themselves.
  - g. Mr. Reynolds described high levels of intimidation and harassment received by individuals at public authority licensed establishments which had impacted on the mental health of employees.

*Engagement of s38(1) FOIA*

55. We remind ourselves that we must consider what evidence was available to the Home Office at the time it refused the Request (18 May 2022) to indicate the likelihood of endangerment arising from disclosure of the disputed information. Examples of activist or extremist activity after that date are, strictly, irrelevant,

save to the extent that they might be shown directly to have vindicated concerns about such activity harboured at the time of refusal.

56. We also remind ourselves that the Request was simply for the names of the “licensed establishments that are public authorities” – not for the specific address within the establishment where any licensed projects are conducted, nor the names of any person involved in those projects, nor any information about the projects themselves. All the establishments whose names were requested were public authorities, and themselves liable to respond to FOIA requests i.e. to disclose the fact of their being licensed establishments subject to the application of any exemption from disclosure. Indeed, many of them have voluntarily disclosed publicly that they are licensed establishments, the licence being a hallmark of, inter alia, regulatory accountability and legitimacy.
57. Having considered carefully all the evidence available to us (both OPEN and CLOSED), we are not satisfied that the Home Office has demonstrated that at the time of refusal of the Request, it was reasonably foreseeable that disclosure of the disputed information would, or would be likely to, endanger the health or safety of any individual, within the meaning of those terms as we construe them.
58. Upon its refusal of the Request, the Home Office's reasoning as to why disclosure was likely to endanger health or safety was flawed: it rested on there being a risk of harm because the use of animals in science is an emotive issue. It failed to address the quality of any causal link between disclosure and endangerment, and advanced straight to public interest considerations. Its evidence at the hearing was, in our view, similarly focused on public interest considerations, namely the extensive efforts by ASRU to engage with stakeholders, including activists, and to provide transparency around the use of animals in science.
59. We fully acknowledge the challenge faced by a public authority trying to assess the likelihood of an event in the future. In addition to any evidence of a specific, imminent threat, it will look to recent examples of relevant activity to assess the threat of such future activity in an appropriately similar context. We also acknowledge that persons in the executive branch of government who are tasked day-to-day with addressing infinite aspects of risk assessment around the use of animals in science will have better insight than most into the threatening climate in which the work is conducted, and the experiences of licensed establishments in that context.

60. However, we find that much of the evidence offered by the Home Office consisted of second-hand reports of generic behaviours beyond the date of the refusal of the Request rather than direct, extrinsic or documentary evidence of specific incidents at around the time of refusal of the Request. We were given no specific details of the conduct giving rise to the fifty or so arrests between July 2021 and 2022 referred to, or what charges or convictions followed, and understood that they mostly, if not entirely, related to activity at, or in relation to, the Facility.
61. As for the handful of examples of activity at or associated with establishments which are public authorities provided to us, which we accept were likely to, and, in some cases did, endanger harm or safety, they were of considerably historic vintage. The Home Office itself accepts that since those incidents there has been a reduction in animal rights extremism.
62. We have considered Mr. Reynolds' evidence that he has first-hand awareness from his visits to licensed establishments of site protests, intimidating behaviour and what he called "ingress" at those sites, having seen evidence of the same in the sites' security logs and footage. We do not wish to diminish the stressful impact of these activities on individuals caught up in them, their very real business-disruption effect, or the wider inconvenience they may cause to the affected community. We also recognise that the cumulative effect of repeated instances of any of these activities may be a sum greater than its parts. However, even were these incidents contemporaneous with refusal of the Request, they do not, as described to us, equiperate, in our view, to endangerment to health or safety.
63. The only specific example before the Tribunal of vigorous activism or extremism proximate to the date of the refusal of the Request was that in relation to the Facility, which is not a public authority and whose identity as a licensed establishment had not been disclosed by the Home Office. In any event, on the evidence available to us, we are not convinced that the type of activities illustrated in that context were overall sufficiently serious as to be likely to endanger health or safety, even though they may have been distressing or frightening to those affected.
64. Critically, the Home Office did not put before the Tribunal any evidence of endangering activity at the time of refusal of the Request at any of the licensed establishments listed in the disputed information, including those who advertise openly the fact of their ASPA licence. This is notable given Mr. Reynolds' insistence that most of the licensed establishments in the disputed information

have been targeted by animal rights activists. We can only infer that such activity did not demonstrate endangerment to health or safety.

65. In its final submission, the Home Office submitted that the safety of the public is, in specific circumstances, dependent on the development of drugs and treatments developed in licensed establishments, and that the disruption of that on a national level, which may very well result from the publication of the comprehensive list of licensed establishments, would have a materially detrimental effect on public health and safety. We do not accept that a “materially detrimental effect” on public health and safety equiperates to endangerment to health or safety. In any event, on the totality of the evidence before us, we consider the prospect of disruption on a national level to be a very remote prospect. We consider this submission to be speculative.
66. We do not accept the Appellant’s submission that the Home Office must demonstrate an “explicitly considered threat of a specific, dangerous attack that is likely or more likely than not to occur as a result of disclosure” (per its Reply) to engage s38(1). That is to go too far. But the Home Office must demonstrate a tighter causal link between disclosure and the likelihood of endangerment to health or safety than it has done. Throughout its submissions and evidence, the Home Office’s language has frequently betrayed its concerns as residing in the area of “potential” rather than “likelihood”, indicating activist or extremist behaviours that “could” or “can” cause harm, and matters of “impact” rather than “endangerment”.
67. The information requested was simply the names of the licensed establishments which are public authorities. We accept that if the Home Office were to disclose their identities, the identity of the Home Office as the disclosing party would lend ultimate credibility to the information. However, where in many, if not all, cases the establishment has already itself publicised its status, the relevance of the Home Office as the disclosing party diminishes. All those who are argued to be likely to be endangered by disclosure must already be keenly aware of the targeted environment in which they work, which in most, if not all cases, has already been secured to reduce the risk of danger. To the extent that the environment is already a dangerous one, the Home Office would need to show that the disclosure of the information requested would be likely to exacerbate that.
68. Looking at matters in the round, and considering all the evidence before us, we are not satisfied that the Home Office has established the requisite causal link

between disclosure of the disputed information at the time of refusal of the Request, and endangerment to health or safety.

69. On that basis we find that neither s38(1)(a) nor (b) is engaged. It is not, therefore, necessary for us to proceed to consider the public interest test.

### S44 FOIA

70. By its Response to the Notice of Appeal, dated 28 January 2024, the Home Office sought to rely on s44 FOIA to refuse disclosure of the disputed information.

71. A public authority is entitled in proceedings before the Tribunal to argue the applicability of any FOIA exemption at the time of a request, even if it did not identify that exemption in its initial refusal of the request. It is evidently desirable for all parties to know sooner rather than later the FOIA exemptions in issue. By raising s44 in its Response to the Notice of Appeal, the Home Office has raised it at the earliest opportunity in its capacity as a Respondent to the appeal and is entitled to seek to rely on it.

72. The Home Office's submission in relation to s44 FOIA was meagre. It was simply that (1) s44 FOIA exempts information from disclosure if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment, and (2) s24 ASPA was effective to prohibit disclosure.

73. S24 ASPA provides as follows:

*“(1) A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence.”*

74. We have difficulty reading s24 as stretching to prohibit disclosure of the identity of a licensed establishment as such. We accept that the identity of a licensed establishment may be information *obtained* by a relevant person in the exercise of their functions under ASPA but not also that the fact of its licensed status is, itself, information which (the person knows or has reasonable grounds for believing) has been *given* in confidence.

75. In our view, that second limb of s24 (information which has been given in confidence) more readily encompasses information such as project content or the name of a licensed individual. Either of those things would, as we understand it, be information which may well be *given* in an expectation of confidence, most likely as part of the process of applying for a relevant licence, but subject always to an appreciation that the Home Office is itself susceptible to FOIA requests.
76. By way of elaboration, the Home Office submits that the grant of an establishment licence is part and parcel of the application process. That does not address our difficulty. We accept that the *act* of the grant of the licence may be regarded as part of the process (based on information given in confidence), but the resultant licensed status is not, itself, part of the process. It is its product.
77. Mr. Reynolds' evidence was that licensed establishments have an expectation that their information will be kept safe and secure by the Home Office, and that their names and addresses will not be published by the Home Office. When asked by the Tribunal to identify the basis for such an expectation, he pointed only to there being a public interest against disclosure and accepted that there was nothing agreed in writing between a licensed establishment and the Home Office which articulated such an expectation or effected an agreement as to confidentiality.
78. We have found, and were shown, nothing in ASPA or the guidance on its operation which provides that the identity of a licensed establishment as such is, itself, confidential, or suggests that the establishment might have that expectation. Indeed, it seems to us that for that fact to be confidential might well diminish rather than affirm the accountability of licensed establishments. and thus, ASPA's function. ASPA makes provision for, inter alia (1) the Secretary of State to enforce compliance with ASPA, take remedial action to safeguard the welfare of protected animals, and suspend or revoke a licence, (2) for a justice of the peace to issue a warrant forcing entry to licensed premises, if they believe an offence is being committed under ASPA, and (3) for proceedings for offences under ASPA to be taken. It does not seem to us that in any of these contexts a licensed establishment would have any expectation of confidentiality as to the fact of its licensed status, and we see no reason why any expectation should be different as between contexts of default or breach and those of day-to-day operations.
79. In any event, any licensed establishment will be aware that the Home Office is subject to the disclosure obligations imposed by FOIA, enacted significantly after

ASPA, and those licensed establishments which are themselves public authorities are, of course, subject to the same obligations.

80. We do not accept that an establishment's licensed status is information given in confidence within the meaning of s24 ASPA.

81. We find that s44 FOIA is not engaged.

*Conclusion*

82. The Tribunal finds that the Home Office was not entitled to refuse the Request pursuant to s38(1)(a) or (b) FOIA. The Commissioner was wrong to find otherwise in the Decision Notice. Nor was the Home Office entitled to refuse the Request pursuant to s44 FOIA.

83. The appeal must be allowed.

Signed: *Judge Foss*

Dated: 26 September 2024

Promulgated on: **26 September 2024**