

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 31 March 2009

Public Authority: King's College London
Address: Strand
London
WC2R 2LS

Summary

The complainant requested information held by several Universities, including King's College London (the "public authority") in relation to research it may have undertaken or be undertaking with primates. This included numbers and species of primates used in previous returns already provided to the Home Office along with a summary of any current research and the species being used.

The public authority originally cited that the information was exempt by virtue of the exemptions at sections 22, 38 and 43 of the Freedom of Information Act 2000 ('the Act'). This was later varied to sections 38(1) and 43(2).

The Commissioner finds that neither exemption is engaged and the complaint is therefore upheld. He further finds that the public authority breached sections 1(1)(b), 10(1), 17(1)(b) and 17(3)(b).

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 Act. This Notice sets out his decision.

The Request

2. On 31 July 2006 the complainant wrote to the public authority and made the following request for information:-

"... under section 1 (1)(b) of the Freedom of Information Act 2000:

1. *please explain how many primates were held under licences and certificates under the Animals (Scientific Procedures) Act 1986 by or at your university, as provided to the Home Office in the last two returns of annual statistics, breaking the figure down by species*
2. *please provide a summary of the research primates are currently used for at the university, again by species*

We are contacting a number of universities in the UK in order [to] collate an accurate and up-to-date picture of primate experimentation at UK universities. Published work by researchers at your institution suggests that primates are being used there. We think it is in the public interest that more information is given about the nature of such use, so that a more complete picture can be obtained about overall primate use in the UK than is currently available.”

3. The public authority received the request on 03 August 2006. On 01 September 2006 the it responded and stated that it believed the information to be exempt under FOIA. It claimed that the exemptions at sections 22, 43 and 38 applied.
4. It also stated that it had enclosed a complaints handling procedure if the requester was unhappy with his response. Unfortunately, according to the complainant , this enclosure was missing.
5. On 12 December 2006 the complainant requested an internal review.
6. On 31 January 2007 the public authority responded to the request for an Internal Review. It decided to uphold its original refusal.

The investigation

Scope of the case

7. On 25 April 2007 the complainant wrote to the Commissioner about this and the other refusals it had received from other public authorities in respect of this request. (The Commissioner has dealt with each complaint under a separate Decision Notice). It included a statement of complaint common to all the cases and a further complaint specific to this public authority.

8. In its submissions it set out the reasons why it considered the public authority had inappropriately relied upon sections 38 and 43 as the basis for refusing the request.
9. The Commissioner notes that the original refusal notice cited section 22 as one basis for refusing to supply information relevant to the second part of the request. However this exemption was not deemed to apply at the internal review stage, nor has the public authority sought to rely upon it in its submissions to the Commissioner. Therefore this decision notice deals solely with the exemptions in sections 38 and 43.
10. The complainant's request was made on 31 July 2006 and therefore covers the Home Office returns for 2004 and 2005. It also requested a summary of research that primates were currently being used for, broken down by species. This therefore covers research being carried out on 31 July 2006.
11. The complainant has not asked for numbers of current primates being held for research. It has also not asked for details of the research that was undertaken using the primates in the two previous returns. The only common factor to both questions is the species in use.

Chronology

12. On 11 September 2007 the Commissioner wrote to the public authority to commence his investigation. He pointed out that the requests had been fully answered by other Universities, i.e. some did confirm that primates were in use and the nature of the research, yet it had cited that it believed it was exempt under Sections 22, 38 and 43. He raised various issues and asked for a response within 20 working days.
13. At the same time, the Commissioner wrote to the complainant to advise that he was now investigating all six complaints.
14. Following a joint request from the six Universities against which complaints had been made, the Commissioner met with them on 18 October 2007 to discuss some of their concerns prior to them answering his initial questions.
15. The public authority sent in further arguments in respect of its continued reliance on sections 38 and 43 on 1 November 2007.
16. Having received and considered the further submissions from the public authority, together with the substantial evidence supplied by the complainant, the Commissioner wrote to the public authority on 3 March

- 2008 to request clarification on a number of issues. The public authority provided this information on 6 March 2008.
17. During the course of this investigation the Commissioner also sought further information in respect of the other related cases he was considering which raised similar issues.
 18. As part of his investigation the Commissioner conducted broad internet searches in order to identify what information was already in the public domain about work the public authority carries out using primates.

Background Information

19. The Animals (Scientific Procedures) Act 1986 (ASPA) came into force on 1 January 1987 and made provision for the protection of animals used for experimental or other scientific purposes in the United Kingdom. ASPA regulates any experimental or other scientific procedure applied to a "protected animal" that may have the effect of causing that animal pain, suffering, distress or lasting harm.
20. ASPA requires that before any regulated procedure is carried out, it must be part of a programme specified in a project licence and carried out by a person holding an appropriate personal licence authority. In addition, work must normally be carried out at a designated scientific procedure establishment. The personal licence is issued to an individual who could be carrying out research at more than one establishment. The personal licence holder, not the institution, is responsible for submitting an annual return to the Home Office stating, amongst other things, the number of animals used in that year under the terms of their licence.
21. The Home Office publishes annual statistics of scientific procedures on living animals which are available on-line at <http://scienceandresearch.homeoffice.gov.uk/animal-research/publications-and-reference/statistics/?view=Standard> These are compiled from yearly returns submitted by licence holders which is a necessary condition of being granted a licence under ASPA. A nil return is required if no work is undertaken.
22. All Universities have to report to the Home Office before 31 January each year. For example, in January 2008 the figures returned will be those for animals used in 2007 which will then be used to compile the report issued in July 2008. This request was made on 31 July 2006 and therefore covers the returns for 2004 and 2005.

23. The statistics subject to this request cover returns for 2004 and 2005 which were published in December 2005 and July 2006 respectively.
24. According to the published statistics, the total number of non-human primates used for licensed research in 2005 was 2472 macaques and 643 tamarins or marmosets. The figures for 2004 were 2045 and 747 respectively.
25. Whilst there is no legal obligation for licence holders to provide abstracts about their research the Government actively encourages their publication. As such, many are 'anonymously' published on the Home Office website at: <http://scienceandresearch.homeoffice.gov.uk/animal-research/publications-and-reference/001-abstracts/> The lists are not complete though there appears to be a high return from establishments. This scheme was fully implemented in January 2005.
26. After its completion, research of the type related to the request may be published and thereby made available to the general public. The published papers indicate the types of research undertaken, the types of animals used, the names of those involved, and sometimes the specific location of the research. Summaries of such research are readily available online via PubMed's website <http://ukpmc.ac.uk/>, which is a service that includes citations from biomedical articles; or the whole research paper can be purchased from the associated publisher (which is identified on this site).
27. There are previous published papers which reveal that primate research has been undertaken either at this establishment and/or by its academics. This includes some specifically referred to on its own website.
28. The complainant requested the same information from several universities. Nine of these complied with the request in full, either stating that they held the information and supplying it or, conversely, stating that they did not hold it. Originally six universities did not reply to the complainant's satisfaction and complaints were made to the Commissioner. During the course of his subsequent investigations one further university responded in full to the complainant and the complaint was therefore withdrawn. The other five complaints have all been dealt with by separate Decision Notices.
29. The Commissioner feels it is important to reiterate his stance of impartiality. He acknowledges that the use of animals in research is highly emotive and it is a matter that many members of the public have strong feelings on all sides of the argument.. However, it is not the Commissioner's role to take sides in this debate. Instead he has to consider each complaint in accordance with the requirements of the Act.

Analysis

Procedural Issues

Section 17 – refusal of request

30. Section 17(1) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should in its refusal notice:-
- (a) state that fact,
 - (b) specify the exemption in question,
 - (c) state why the exemption applies.
31. In its original refusal notice the public authority stated that it was relying on sections 38 and 43 and did not include any relevant sub-sections. This was not rectified at the internal review stage and is therefore in breach of Section 17(1)(b).
32. Section 17(3)(a) requires that where an exemption being relied on by a public authority is a qualified exemption it should state in its refusal notice the reasons for claiming that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. In this case, the public authority failed to specify the public interest factors it had considered by the time of the completion of the internal review. It therefore breached section 17(3)(b).
33. In addition, by not providing the requested information to the complainant within 20 working days of the request, the public authority breached section 10(1). By not providing it to the complainant by the time of the completion of the internal review, it breached section 1(1)(b).

Exemptions

34. The PA argued that sections 38 and 43 of the Act were applicable to the information. The Commissioner considered the application of each exemption in turn.

Section 38 – health & safety

35. 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. As the public authority has not stated the relevant

- subsection being relied on the Commissioner has assumed that it is withheld under subsection (1)(a) and (b).
36. The public authority did not specify whether it was relying on the argument that disclosure of the information *would have* endangered the physical health, mental health or safety of any individual or whether disclosure *would have been likely* to endanger the physical health, mental health or safety of any individual. On this matter the Commissioner has noted the comments of the Tribunal in *McIntyre V ICO & the Ministry of Defence*, [EA/2007/0068] in which the Tribunal explained, at paragraph 45 that:
- “We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.”*
37. It is the Commissioner’s view that where a public authority has not specified the level of prejudice, or in this case endangerment, at which an exemption has been engaged, the lower threshold of “likely to endanger” should be applied, unless there is clear evidence that it should be the higher level. In the absence of any such evidence, he has therefore applied the lower threshold in this case.
38. In dealing with the issue of whether disclosure would have been likely to endanger the physical health, mental health or safety of any individual, the Commissioner notes the comments of the Information Tribunal in the case of *John Connor Press Associates Limited v The Information Commissioner* [EA/2005/0005]. Whilst this decision related to the likelihood of prejudice to commercial interests, the Commissioner believes that the test is equally applicable to assessing the likelihood of endangerment under section 38. In its decision the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (para 15). The Commissioner has viewed this as meaning that the risk of prejudice or endangerment need not be more likely than not, but must be substantially more than remote.
39. In support of its contention that section 38 was engaged at the time of the request in its original refusal notice the public authority informed the complainant that: *“The activities of a small number of animal rights extremists make it necessary to protect establishments and individuals licensed under the 1986 Act. King’s believes that it is under a duty to protect itself, as an establishment and individuals who work here. This protection extends to their families and others associated with them, from potential harassment and harm. Even if the risk to any individual is low,*

the impact would be high. King's therefore believes that it is not in the public interest to disclose this information as it may contain details that could be distributed widely."

40. During further correspondence with the Commissioner the public authority raised further arguments in respect of section 38. However, although the complainant made two different information requests it should be noted that the public authority's arguments have not been separated to provide individual responses to these.
41. The Commissioner notes the points made by the public authority and has considered very carefully the extent to which the disclosure of the information that was requested in this case might have led to an increase in the risk to the physical health, mental health or safety of any person.
42. The Commissioner has considered the public authority's arguments regarding the application of the exemption to each request in turn.

Request 1 - Numbers and species of primates as provided to the Home Office in the last two returns of annual statistics

43. The public authority has stated that: *"Primate inspection and licensing is carried out by the Home Office under the terms of the Animals (Scientific Procedures) Act 1986 and associated codes of practice. The Home Office regime applies equally to the public and private sectors and across the whole UK. To promote public understanding the Home Office publishes detailed statistics on animal research every year. Abstracts for each licensed study are also published. According to the Home Office, up to 90% of applicants now complete these abstracts."*
44. It went on to express the view that the Commissioner had: *"... previously accepted that ... information published by the Home Office 'is sufficient to facilitate public debate of the pros and cons of animal experimentation' (Decision Notice FS50082472). It seems unlikely that the publication of further information identifying a small number of higher education institutions would significantly enhance any public debate. It would however isolate these institutions and raise the level of risk that they face."*
45. Whilst the Commissioner may have previously accepted that information currently published by the Home Office is sufficient to facilitate public debate of the pros and cons of animal experimentation in his Decision Notice reference FS50082472, it is important to reinforce that Decision Notices are written on a case-by-case basis and whilst previous Decisions can be useful they do not necessarily set a precedent. This particular case related to a request made to the Home Office for the names of those holding licences at all of the 35 licensed establishments in Scotland. The

- Commissioner was satisfied that disclosure of information revealing the identities of individuals holding licences would or would be likely to endanger the health and safety of them as individuals. This previous request cannot be considered to be the same as the request made by the complainant which specifically does not include any names.
46. It further stated that: *“[a]rguments for maintaining the confidentiality of any license data that would specifically identify an institution were considered by the Information Commissioner in 2006. He held that the ‘disclosure of information revealing the location of laboratories at which animal experimentation takes place...would be likely to endanger the health and safety of individuals’ (Decision Notice FS50082472). The College feels that this continues to be true especially in relation to primate data.”*
47. With regard to the public authority’s comment about the Commissioner’s view being that *“disclosure of information revealing the location of laboratories at which animal experimentation takes place...would be likely to endanger the health and safety of individuals”* the Commissioner would like to clarify that the full quotation was actually that *“disclosure of information revealing the location of laboratories at which animal experimentation takes place, and the identities of individuals holding licences to carry out experimentation, would or would be likely to endanger the health and safety of individuals”*. In this previous decision compliance with the request would have involved the naming of licence holders and was therefore significantly different to this current case in which information about individual licence holders has not been requested.
48. The public authority has argued that: *“Information released under the Freedom of Information Act passes into general circulation and could easily come to the attention of extremists”* and also that *“These individuals [extremists] are a very small number but they are highly dangerous.”*
49. The Commissioner accepts the point that disclosure to the complainant is not to it personally and, as such, the complainant cannot control how the information is used in future if it were disclosed.
50. The public authority has also said that: *“The way that the [complainant] have gone about their enquiries also raises the prospect of a risk to the wider education sector, beyond the College. The [complainant] have asked for the same detailed information from a range of UK universities and colleges. If all this information was released and brought together it could be readily compiled into a league table, ranking institutions according to the number of primates involved in current studies and the various species that they hold. This could assist extremists in identifying targets and devising campaigns.”*

51. The Commissioner recognises that it is possible that some sort of historical league table might be compiled as a result of information disclosed in response to this and related requests. But, even if the publication of such a table were to increase the risks of some sort of extremist action directed against institutions at the top or bottom, the line of causation would be too long to conclude that disclosure of the disputed information would be likely to endanger any individual. In reaching such a view, the Commissioner has noted that the complainant did not request numbers of primates involved in current studies only the species concerned and the types of research being undertaken
52. There were previous published papers available at the time of the request which revealed that primate research had been undertaken either at this establishment or by its academics. In respect of this, the public authority has stated that: *"The [complainant] have argued that 'KCL researchers have published extensively about their primate research [so] it is impossible to understand how disclosure...could add any risk to health and safety that already exists'. Published academic papers ... do indeed give details of how a study was conducted, indicating whether research was UK based, what animals were involved and how they were housed and handled. However, academic publication is at the discretion of each research study group. They chose an appropriate time to publish, often a year or more after a study has finished. Papers usually involve numerous co-authors from different institutions so it is not always clear where experiments actually took place. In addition, by the time that research is published members of the study team are likely to have changed so direct personal risks will have been reduced."*
53. The Commissioner considers that the contents of published research would therefore already allow the public authority to be considered as a 'target' by animal rights activists if historical data, such as that requested, carried any associated risk. This could occur even if such publication were not done until some time after the completion of that particular area of research. This published research obviously contains much more detail than the information that has been requested. However, this has been seen as an acceptable risk. Any risk to health and safety has not been deemed to override the importance of promulgating the research.
54. The public authority has also indicated to the Commissioner that it already considers itself to be a 'target' for animal rights extremists (AREs) who it considers to be a *"real and serious threat"*. It has included the following statements to him in support of this:

- *“King’s staff have been targeted by AREs in the past. During the 1980s extremists demonstrated outside the home of an academic and planted a viable explosive device under his car.”*
 - *“A ... member of staff has been posted on the ‘death list’ of the Animal Liberation Front (ALF), published on the internet.”*
 - *“London is the site of on-going extremist activity. In 2006 three extremists were jailed after attacking a family who displayed a pro-hunting sticker in their car in Richmond. In May 2007 leading SHAC (Stop Huntingdon Animal Cruelty) activists were arrested in London.”*
55. It has also stated: *“This information is especially sensitive because primate research is a touchstone issue for the animal rights movement, as demonstrated by the Felix Campaign (see www.speakcampaigns.org).”*
56. The Commissioner therefore considers that risk therefore can be shown to have both pre-existed the request and also post-dated the request. He is therefore of the opinion that this demonstrates that there was an on-going risk at the time of the request.
57. The Commissioner notes that it is apparent from the original request that the complainant has only ‘targeted’ those universities where it had already established a likelihood that the requested information would be held based on information already in the public domain at that time. The public authority has confirmed it undertakes such research and has therefore connected itself, and its associates, with primate experimentation.
58. The Commissioner considers that the disclosure of information in respect of previous returns to the Home Office cannot result in any more risk than already exists. The published research he has viewed, dated both prior to and post the request, contains more detailed information about primate experimentation than has been requested. In addition, the species of primates used are already limited to the few species identified in the published returns (see paragraph 24 above).
59. The Commissioner does not believe that responding to the first part of the request made by the complainant adds to any existing health and safety risk. The public authority has provided its own statements which demonstrate that it is already a target and that it has been a target because of its work in the past. The risk therefore pre-exists this request and the Commissioner does not accept that the information which has been requested would add to this on-going threat.
60. Whilst the Commissioner recognises the public authority’s concerns in respect of releasing any information in relation to the request he again

notes that the public authority has, nevertheless, not sought to deny that it holds such information.

61. For the reasons given above, the Commissioner does not find that the exemption at section 38 is engaged in respect of the first part of the request.

Request 2 - Summaries of current research using primates, by species

62. The public authority has provided several arguments (italicised in the following paragraphs) to the Commissioner which can be aligned to this part of the request. He has gone on to consider them below.
63. As already mentioned above, the public authority has said that: *“The Home Office is careful to protect confidentiality and security. None of the information it publishes associates King’s directly with ongoing studies. When data is released it is in an anonymised form. Licenses are protected by a statutory duty of confidence and abstracts are drafted to avoid identifying specific institutions or individuals.”*
64. It has further stated that: *“The [complainant] request seeks to sidestep this regime and to link King’s with detailed, specific information about numbers of primates, their species and the types of study they are involved in.”*
65. Despite its perceived threat of risk to the health and safety of individuals the Commissioner again notes that the public authority has not opted to ‘neither confirm nor deny’ that it holds the information. Although the public authority states that nothing is published by the Home Office which associates it with current research, the Commissioner views this as irrelevant as the public authority has already made this association.
66. The public authority has argued above that *“licenses are protected by a statutory duty of confidence”*. However, the Commissioner does not see the relevance of this statement as licence details have not been requested. Furthermore, if the public authority believed that this were the case then it could have claimed that section 41 (information provided in confidence) or 44 (prohibitions on disclosure) applied.
67. The Commissioner also notes the argument above that *“abstracts are drafted to avoid identifying specific institutions or individuals”*. However, abstracts have not been requested and the Commissioner does not accept that the summary he was provided with could be successfully matched to a published abstract. It is also of note that, although encouraged by the Home Office, the provision of abstracts remains voluntary, they contain nothing which attributes them to any specific

- institution, and there it is not known whether such an abstract/s has/have been provided by the public authority.
68. Although it may be possible to guess whether a published abstract was linked to a particular summary this would remain speculative as the provision of abstracts is not compulsory. There could be similar research being undertaken at a different establishment which had provided such an abstract. Having reviewed some of the abstracts which he considered were most likely to involve primate research, the Commissioner found none which actually stipulated that primates were being used.
69. The Commissioner also understands the argument that releasing a summary of the current research could possibly divulge the likely project licence holder and create more risks for the individuals involved with that project. However, he does not accept that the release of a summary of the types of research being undertaken could in itself create any more risks to any individual than currently exists, bearing in mind that the public authority has disclosed that it currently does such research.
70. The Commissioner understands that the Home Office does not publish the amount or nature of primate research down to establishment level and therefore that the information requested has not previously been placed in the public domain. However, the fact that primate research is conducted at this establishment is now in the public domain as a result of the request, and the second part of the request only seeks to ascertain what type/s of research are currently being done and the species used. Animal rights campaigns have evidently been ongoing prior to the request, as shown above, and this has not persuaded the public authority to either cease such research or to seek to deny it is being done.
71. The public authority has also said that: *“In assessing likely risks King’s must look to the past actions and tactics of extremists. The College believes that disclosure will draw attention to sensitive, ongoing research and raise an unacceptable threat.”* It has further stated that: *“Disclosure of specific, current information about research involving primates (a topical and highly emotive issue) will raise unjustified risks for King’s staff, students and associates.”* However, the Commissioner again notes that it has already drawn attention to itself by confirming the research is done.
72. The same argument would apply to the public authority’s wider responsibility in relation to other staff and those associated with the establishment. There has been no denial that such work is being carried out so any risk was likely to be on-going at the time of the request.
73. The ‘animal rights’ campaigns have been going on for many years. Presumably, any group intent on pursuing its campaign would be avidly

- checking publications to assess what has been happening recently and would be readily able to target those involved if this was their desired course of action. There is also nothing to suggest that release of further limited information would escalate this.
74. The Commissioner has provided what he considers to be an acceptable summary in a confidential annex to this Notice. He does not accept that this could be accurately 'linked' with any published extracts.
75. The public authority also advises that written research papers usually involve numerous co-authors from different institutions and it is not always clear where experiments actually took place – though it does not deny that it participates in such research. Additionally, it states that by the time that a research paper is published the members of that particular study team are likely to have changed so direct personal risks will have been reduced. However, the Commissioner is of the opinion that any genuine health and safety risk to those associated with such work would nevertheless prevail. Once the names of researchers involved are made public by publishing their research then their current whereabouts can be fairly easily ascertained. If the belief is that the researcher is the main target then they could be located and their current whereabouts would become a target. However, if the target is the institution then it will not be important whether or not the researcher is still there.
76. The public authority argues that the request is for topical information about ongoing studies that are staffed by current personnel and that there is therefore an increased risk to their health and safety. It believes that this information is of a different nature and quality to that found in a later published paper. However, the fact that such work is taking place has not been denied so any associated risk already exists. The Commissioner believes that it would be relatively easy to look online at the different faculties within the public authority and, coupled with previously published research, ascertain where such research was most likely to be currently taking place and even to surmise the likely researchers involved.
77. The Commissioner also notes that the public authority is concerned that releasing the information requested would isolate the institutions concerned and raise the level of risk that they face. However, he believes that they are already isolated by publishing reports and confirming that they hold the information requested. He therefore finds that this argument fails.
78. The Commissioner is additionally of the view that information in the public domain, both prior to and post the request, is relevant as an indication that no harm has occurred as a result of it being widely known. In this particular request he also accepts this to be the case.

79. For the reasons set out in the paragraphs above, the Commissioner finds that in the specific circumstances of this case, and with considerable weight placed on the information already in the public domain, the exemption is not engaged.

Section 43 – Commercial Interests

80. The public authority has confirmed to the Commissioner that it was seeking to rely on section 43(2). This provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
81. The public authority informed the Commissioner that it believed that disclosure of the withheld information may have had a prejudicial effect on its own commercial interests. This is because it believed it could have a detrimental effect on the research funding it received.
82. The Commissioner accepts that the information withheld related to the commercial activities of the public authority and therefore fell within the scope of the exemption contained in section 43(2). He then went on to consider the likelihood that the release of the information would have prejudiced the commercial interests of the public authority.
83. The public authority did not specify to the Commissioner whether its view was that disclosure would prejudice its commercial interests or would be likely to prejudice its commercial interests. However, in its original refusal notice section 43 was said to apply because it believed that “... *release could have a detrimental impact...*” As the public authority has stated that disclosure *could* have a detrimental impact the Commissioner believes that the public authority has taken the stance that disclosure would be likely to prejudice its interests rather than that it would prejudice them.
84. In dealing with the issue of whether disclosure would be likely to prejudice the commercial interests of the public authority, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that “*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*” (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
85. The public authority has claimed that release of the information would prejudice its own commercial interests. It has advised the Commissioner that research provides it with significant income from three sources –

- direct award of research grants, contract research from the pharmaceutical & biotechnology industry and via its own spin-out companies. It points out that the research sector is highly competitive, with competition from both public and private sectors within the UK as well as from overseas.
86. In its original refusal notice section 43 was said to apply because *“King’s believes that the information requested is commercially sensitive and release could have a detrimental impact on commercial revenue and weaken its position in this competitive environment. Section 43 can apply to commercially sensitive information held by King’s relating to an outside organisation.”*
87. It goes on to argue that it must ensure confidentiality as this is vital within the pharmaceutical & biotechnology sector. It believes that a measure of privacy ensures security for on-going studies and protection from AREs. It believes that confidentiality: *“helps ensure the integrity of valuable commercial secrets”*. It further states that: *“... the information requested ... identifies the timing and nature of ongoing research and is indicative of particular research interests and therapeutic areas. This information can be commercially revealing, especially when triangulated with other data sources.”*
88. The public authority is also concerned that the release of the requested information would mean that a number of higher education bodies would become subject to different ASPA reporting standards. This is because there are obviously other bodies which are still covered by ASPA but, as they are not public authorities, are not caught by the Act.
89. It believes that any new ‘burden’ of disclosure will differentiate unequally between market competitors. It further believes that this may lead to research being taken away, moving to ‘private’ alternatives – in particular for pre-patent development research.
90. In *Hogan v Oxford City Council & The Information Commissioner* [EA/2005/0026 & EA/2005/0030] the Information Tribunal stated 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.”*
91. The Commissioner has considered the public authority’s arguments very carefully. In respect of the complainant’s first question he cannot envisage how the release of numbers / species of primates in previous returns could possibly impact on the commercial interests of the public authority. This element only covers past numbers and species of primates. No details of the types of research have been requested.

92. Whilst details of current research could possibly have an impact if, for example, the information revealed specialist techniques which were considered to be sensitive, the Commissioner notes that the complainant only requires a summary of current research, along with species of primate used.
93. As previously mentioned, the Commissioner notes that the Home Office encourages project licence holders to submit abstracts about their work which are subsequently published. In fact, the public authority has itself stated that, according to the Home Office, *'up to 90% of applicants now complete these abstracts'* which demonstrates that there is a high return.
94. The Commissioner further enquired with the Home Office about any patterns of non-supply of abstracts. He specifically requested information to clarify whether any particular institutes failed to submit an abstract or whether it was for any particular species of animal. He was advised that *"... there is no apparent pattern to the failure to provide an abstract, either in terms of the type of research or the animals being used for the research. Nor do any particular establishments consistently fail to provide abstracts."* There is nothing to therefore suggest that an abstract for primate research is any more likely to not be provided than in any other case and this type of research is not deemed to be any more commercially sensitive than any other type.
95. Whilst abstracts are published without reference to the establishment or licence holder the areas of research being undertaken are available and are therefore already in the public domain. The published information is often quite detailed and reveals more about the work than the complainant has requested. Anyone wishing to ascertain what types of research are currently on-going in order to seek some sort of competitive advantage would only need to look at these abstracts. The Commissioner does not therefore believe that the information supplied in a summary could have an impact on the source's commercial interests or those of its investors which will remain anonymous.
96. For the reasons set out above, the Commissioner is not satisfied that the public authority has provided sufficient evidence to suggest that responses to either request made by the complainant would be likely to prejudice its commercial interests. Therefore he finds that the exemption under section 43 of the Act is not engaged and the public authority wrongly relied on this exemption to withhold the information.

The Decision

97. The Commissioner's decision is that the public authority has not dealt with the request for information in accordance with the FOI Act in that:
98. The public authority failed to satisfy the requirements of sections 17(1)(b) & (c) as it failed to specify which sub-section of sections 38 and 43 it was relying on by the time of the completion of the internal review. It also breached section 17(3)(a) as it failed to specify the public interest factors it had considered by the time of the completion of the internal review.
99. The public authority inappropriately withheld the requested information under sections 38(1) and 43(2). In doing so it also breached sections 1(1)(b) and 10(1).

Steps Required

100. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.
101. The requested information should be released to the complainant.
102. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other Matters

103. The Commissioner would like to acknowledge help he has been given by the Animals Scientific Procedures Division of the Home Office. Staff gave helpful advice which has assisted in compiling this Notice.

Right of Appeal

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

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX
Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 31st day of March 2009

Signed (on behalf of the Commissioner and with his authority)

.....
Peter Bloomfield
Senior Corporate Governance Manager

For and on behalf of
Richard Thomas
Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal annex

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 10(1) provides that –

...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 11 provides that –

(1) Where, on making a request for information, the applicant expresses a preference for communication by any one or more of the following means, namely –

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.”

Section 17 provides that -

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

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

(2) Where –

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –

- (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in Section 2(3) is relevant to the request, or
- (ii) that the information is exempt information only by virtue of a provision not specified in Section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within Section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application

- of subsection (1)(b) or (2)(b) of Section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of Section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5)** A public authority which, in relation to any request for information, is relying on a claim that Section 12 or 14 applies must, within the time for complying with Section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where:
- (a) the public authority is relying on a claim that Section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7)** A notice under subsection (1), (3) or (5) must-
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by Section 50.

Section 22 provides that -

- (1)** Information is exempt information if-
- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)
- (2)** The duty to confirm or deny does not arise if, or to the extent that, compliance with 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

Section 38 provides that -

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

Section 43 provides that -

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) 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, prejudice the interests mentioned in subsection (2).