

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 September 2013

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant submitted six requests to the Home Office all of which focused on some aspect of its role in licensing establishments to carry out testing on animals. The Home Office refused to confirm or deny whether it held information falling within the scope of three of these requests on the basis of section 44(2) of FOIA. In relation to the remaining requests the Home Office either provided information it did hold, or explained that no information was held. The complainant disputes the application of section 44(2) and in relation to the three remaining requests either disputes the Home Office's position that no recorded information is held or argues that further recorded information is in fact held. The Commissioner is satisfied that section 44(2) has been applied correctly and in relation to the three further requests is satisfied that no further recorded information is held by the Home Office. However, the Commissioner has concluded that the Home Office breached section 17(7)(a) in providing a defective refusal notice.

Request and response

2. On 24 July 2012 the complainant wrote to the Home Office and requested information in the following terms:
 - '1. To what departments were clinical data received (from sewing kittens eyes up and placing them in darkness for 12 weeks, at Cardiff University, concluded in 2010) sent to, within the UK and abroad?*
 - 2. Are there any future plans to conduct experiments (as above) for eye research on kittens, beagles or primates, sewing their eyes up, and*

keeping them in darkness for what length of time, at (follow)ing establishments:

a – Cardiff University

b – HLS

c – Oxford University

3. How many Inspectors were sent to monitor the eye research at Cardiff University during the time of these experiments, concluding in 2010, giving dates and times of inspections?

4. How many inspectors are there employed by the Home Office for these 3 x establishments?

5. What other experiments go on within Cardiff University, using living animals.

6. What animals are used apart from Rats/Mice.'

3. The Home Office responded on 22 August 2012. In relation to requests 2, 5 and 6 it relied upon section 44(2) of FOIA as a basis to refuse to confirm or deny whether it held information falling within the scope of these particular requests. It explained that section 44(2) provided an exemption which permits a public authority to use a statutory bar to disclosure, set out in other legislation, as a basis to refuse to comply with an FOI request. In the circumstances of these requests the statutory bar which the Home Office was relying on was that contained at section 24(1) in the Animals (Scientific Procedures) Act 1986 (ASPA). In relation to request 1 it explained that it did not hold the information requested. In relation to request 3 it explained that it did not hold all of the information requested, however it provided the complainant with the information regarding the relevant visits that it did hold. Finally, the Home Office also provided some information in relation to request 4.
4. The complainant contacted the Home Office on 31 August 2012 in order to explain her dissatisfaction with how the requests had been handled and asked for an internal review to be undertaken.
5. The Home Office informed her of the outcome of internal review on 29 October 2012. The review concluded that the exemption provided by section 44(2) of FOIA had been applied correctly to requests 2, 5 and 6. The review also concluded that she had been provided with such relevant information as was held by the Home Office which fell within the scope of requests 1, 3 and 4. However, the review also concluded that she was not given clear instructions in the Home Office's original response about how to submit an internal review.

Scope of the case

6. The complainant contacted the Commissioner on 18 March 2013 to complain about the way all six of her requests for information had been handled. Her grounds of complaint were as follows:
 - With regard to requests 2, 5 and 6 she disputed the Home Office's reliance on section 44(2) of FOIA. (During the course of the Commissioner's investigation the Home Office explained that it was also seeking to rely on section 38(2), the health and safety exemption.)
 - In relation to the remaining three requests she either disputed the Home Office's position that no recorded information was held or argued that further recorded information was in fact held.
 - She was also dissatisfied with the Home Office's failure to provide her with clear instructions about how to seek an internal review of its initial response of 22 August 2013.
7. The complainant provided submissions to support her various points of complaint which the Commissioner has referred to in his analysis below.
8. With regard to complainant's first point of complaint, it is important to recognise that the right of access provided by FOIA as set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held of course. Both rights are subject to the application of exemptions.
9. In this case the Home Office has relied upon sections 44(2) and 38(2) to refuse to confirm or deny whether it holds the requested information, i.e. they have relied on these exemptions in order not to fulfil the duty contained at section 1(1)(a) of FOIA. Therefore this notice simply considers whether the Home Office are entitled, on the basis of either of these exemptions, to refuse to confirm or deny whether it holds the requested information. The notice does not consider whether the requested information – if held – should be disclosed.

Reasons for decision

Requests 2, 5 and 6

Section 44(2) – statutory prohibition

10. Section 44 of FOIA states that:

'(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,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).'

11. This is an absolute exemption, rather than a qualified exemption, and therefore it is not subject to the public interest test.

The Home Office's position

12. As noted above, the statutory bar which the Home Office is relying on in this case is contained at section 24(1) in the Animals (Scientific Procedures) Act 1986. This states that:

'24 Protection of confidential information.

(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.'

13. In support of its application of section 44(2) to requests 2, 5 and 6 the Home Office noted that these requests sought information about three separate establishments by reference to specific types of animal testing. The Home Office explained that it independently licenses such science and testing on animals and it would hold information in the scope of the request **if** any existed. However the Home Office argued that if it were to hold any information falling within the scope of these requests it would have been provided in confidence by the stated establishments and received in confidence by Home Office staff in their official capacities.
14. The Home Office argued that animal testing is a particularly sensitive subject with significant public engagement. Establishments involved in animal testing are routinely targeted by animal rights activists in campaigns, sometimes involving aggressive or violent actions. Consequently, the application and surrounding information submitted for the purposes of seeking license to conduct experiments on animals is

always assumed to have been supplied in confidence by relevant bodies, whether expressly stated or not, and is always treated as having been received in confidence.

15. The Home Office argued that if it were to confirm or deny the existence of information by reference to such specific questions as those contained in requests 2, 5 and 6 it would, in effect, be disclosing whether or not such specific applications had been made and therefore the intention of the establishments to carry out testing of the nature described in the requests. Assuming information was in fact held, if the Home Office confirmed its existence it would be disclosing information provided to it in confidence. If in fact no information was held, and the Home Office confirmed this, then it would be undermining its ability to adopt a neither confirm or deny position in the future (i.e. it would become clear that the Home Office only relied on section 44(2) when it in fact held information of this kind.)

The complainant's position

16. In submissions to the Commissioner the complainant argued that disclosure of the information she requested was in the public interest for a number of reasons. She argued that conducting experiments of this nature in the future would be cruel and unnecessary as they were likely to show the same data as experiments that had already been conducted. She argued therefore that any future experiments would purely be done for financial gain in terms of receiving government grants. Consequently, she argued that there was a public interest in disclosure of information about future experiments as withholding this information hid potential illegal, unlawful and underhand profiteering at the taxpayers' expense. The complainant also argued that disclosure of the information she requested was in the public interest so that those using eye medication could make informed choices about the medicine they used.
17. Furthermore, the complainant argued that the Home Office's reliance on section 44(2) was illegal and unlawful as it was incompatible with other pieces of legislation. Specifically, the complainant referenced Article 10 of the 'Human Rights Charter' which provides the right to receive information and the Animal Welfare Act 2006 which the complainant argued should be interpreted as placing a safeguard and protection for all animals, especially those at government units, and by inference meant that information of the nature sought by these requests should be disclosed.

The Commissioner's position

18. The Commissioner is satisfied that establishments which are licensed by the Home Office to conduct animal testing submit information relating to

their licenses and their use in confidence. The Commissioner accepts that this expectation of confidence exists and is relied upon, even if it is not stated explicitly whenever information is shared with the Home Office, given the established custom and practice. That is to say, given the significant public engagement on issues relating to this topic, in particular the more extreme responses by a small minority of the public referred to by the Home Office, establishments which provide such information to the Home Office have an implicit expectation that such information will not be disclosed.

19. Therefore, the Commissioner accepts if the three institutions specified in these requests had provided the Home Office with information about the type of animals they were conducting experiments on, such information would have been provided in confidence. Consequently, the Commissioner accepts that, if held, the information falling within the scope of requests 2, 5 and 6 would be exempt from disclosure by virtue of section 44(1)(a) of FOIA because it falls within the definition of section 24(1) of ASPA.
20. Furthermore, given the very specific of the wording of requests 2, 5 and 6, the Commissioner accepts the logic of the Home Office's argument that even if it simply confirmed whether or not it held information falling within the scope of these requests it would still be disclosing information provided in confidence. That is to say, confirming whether or not information was held would reveal whether particular institutions were conducting experiments on particular breeds of animal. The Commissioner is therefore satisfied that the Home Office can rely on section 44(2) to refuse to confirm whether or not it holds information falling within the scope of requests 2, 5 and 6.
21. In reaching this conclusion the Commissioner recognises that the complainant has advanced a number of reasons why disclosure of the requested information (if held) would be in the public interest. However, as the exemption contained at section 44 of FOIA is an absolute exemption and thus not subject to the public interest test under section 2 of FOIA, any arguments as to the public interest in disclosure of the requested information are not relevant to the Commissioner's consideration of section 44.
22. With regard to the complainant's arguments that the application of section 44(2) is incompatible with other legislation, specifically the Animal Welfare Act 2006, the Commissioner understands that the provisions of this legislation explicitly make allowance for situations where animals are subject to activity licensed under other legislation. He therefore does not accept there is any incompatibility with the ASPA and there is certainly none with FOIA.

23. In terms of the complainant's reference to the 'Human Rights Charter', the Commissioner recognises that Article 10 of the European Convention on Human Rights provides the right to freedom of expression, which includes the freedom to receive and impart information. However, the Supreme Court has previously found that '*article 10 creates no general right to freedom of information*' and that where domestic legislation creates restrictions on access to information (e.g. through FOIA exemptions), there is no interference with Article 10 rights where that exemption is engaged.¹ Therefore the Commissioner is satisfied that the Home Office's reliance on section 44(2) is not incompatible with Article 10 of the European Convention on Human Rights.
24. In light of his findings in relation to section 44(2), the Commissioner has not gone on to consider the Home Office's reliance on section 38(2) of FOIA.

Request 1

25. The Home Office informed the complainant that it did not hold any information falling within the scope of request 1 in which she had sought information about '*... what departments were clinical data received (from sewing kittens eyes up and placing them in darkness for 12 weeks, at Cardiff University, concluded in 2010) sent to, within the UK and abroad?*'
26. The complainant disputes the Home Office's position and believes that some recorded information would be held by the Home Office.
27. Where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
28. In applying this test the Commissioner will consider:
- the scope, quality, thoroughness and results of the searches; and, or
 - other explanations offered as to why the information is not held.
29. The complainant argued that that it is likely that the Home Office would have a business / operational need to hold information falling within the scope of this request. She argued that it cannot simply be the case that

¹ [Sugar v BBC \[2012\] UKSC 4](#), para 94

the Home Office issues licences and conducts inspections in relation to animal testing but then takes no further interest in how the institutions it regulates uses the data they generate.

30. In order to address this aspect of the complaint, the Commissioner asked the Home Office to explain the role it plays in regulating institutions which conduct experiments involving animals in order to support its presumable position that it does not have a business or operational need to hold information falling within the scope of request 1.
31. In response the Home Office confirmed that it had no business or operational need to hold the information sought by request 1. It went on to explain that it had an impartial role in licensing science on animals. It neither sponsors scientific research involving the use of animals, nor does it set any requirements for any data produced from such procedures or experiments. The Home Office directed the Commissioner to a number of website links which provided further detailed the Home Office Animals in Science Regulation Unit:
 - Page 7 of: <https://www.gov.uk/government/publications/animals-in-science-regulation-unit-annual-report-2012>
 - <https://www.gov.uk/research-and-testing-using-animals>
32. Having considered the Home Office's submissions, the Commissioner can see no obvious business or operational need for it to hold clinical data generated as a result of particular experiments nor any need for it then provide such data onto other government departments or indeed abroad. Consequently, on the balance of probabilities the Commissioner is satisfied that the Home Office does not hold any information falling within the scope of request 1.

Request 3

33. This request sought details of *'How many Inspectors were sent to monitor the eye research at Cardiff University during the time of these experiments, concluding in 2010, giving dates and times of inspections?'*
34. In response the Home Office explained that it did not hold all of the information requested as it did not keep a record of the times of the visits. However, it explained that there were 57 visits to the establishment by, in total, 8 members of the Animals Regulation Unit Inspectorate. It also provided the complainant with the 57 dates in question ranging from August 2005 to August 2010.
35. In her complaint to the Commissioner the complainant argued that the dates which have been provided were sporadic in nature and she

therefore suggested that the Home Office may hold details of further inspections that took place but which have not been provided to her. In other words, she argued that the information provided represents an incomplete list of the relevant inspection dates. Furthermore, the complainant argued that she had submitted the same question to Cardiff University and received a different response and this led her to question the validity of the Home Office's response.

36. In order to address this aspect of the complaint, the Commissioner asked the Home Office to explain what searches were carried out to locate the information that was provided and why these searches would have been likely to locate **all** relevant information. The Commissioner also asked the Home Office to clarify how it actually recorded the dates of inspections of each institution.
37. In response the Home Office explained that the table of the 57 dates provided to the complainant was put together using the visit reports filed by inspectors after visiting the site in question. The Home Office explained that the inspectors file their reports in a dedicated part of the Home Office electronic Corporate File Plan (CFP). The CFP was examined in detail in order to put the disclosed table together. It represents all the recorded information held in scope of the request by the Home Office.
38. Furthermore, the Commissioner has seen the response from Cardiff University that the complainant refers to. The Commissioner notes that the request submitted to Cardiff University whilst similar to request 3 which was submitted to the Home Office, it not identical. It read as follows: *'Can you give me dates and times of visiting Inspectors to Cardiff University vivisection unit to oversee these experiments from Jan 2010 to Dec 2010. Also Jan 2011 to Dec 2011?'* (In response Cardiff University provided three dates in 2010); whereas request 3 which was submitted to the Home Office, covered a broader timescale seeking as it did information *'during the time of these experiments, concluding in 2010'*.
39. Given the Home Office's explanation, the Commissioner is satisfied that it has undertaken reasonable and logical searches to locate any information relevant to this request. The fact these searches were the appropriate ones to locate any relevant information is evidenced, in the Commissioner's opinion, by the fact that using this method the Home Office located the dates of 57 separate visits over a five year period. Furthermore, the Commissioner believes that the different wording of the requests submitted to the Home Office and Cardiff University explains the varying responses provided. In light of this, on the balance of probabilities, the Commissioner is satisfied that the Home Office does not hold any further information falling within scope of request 3 beyond that which has already provided to the complainant.

Request 4

40. This request asked '*How many inspectors are there employed by the Home Office for these 3 x establishments?*' In response, the Home Office explained that each establishment under the Animals (Scientific Procedures) Act 1986 has at least one member of the Animals in Science Regulation Unit Inspectorate assigned to it as the local Inspector.
41. The complainant argued that this response was somewhat ambiguous, for example the phrase '*at least one member*', and moreover did not provide any real explanation for how the Inspectorate's total number of inspectors are allocated to the three institutions in question.
42. The Commissioner recognises the complainant's concerns albeit that in terms of FOIA, his role is limited to establishing what recorded information the Home Office holds that would fall within the scope of the request as opposed to the accuracy of information provided. The Commissioner therefore asked the Home Office to clarify whether any further recorded information is held – beyond that provided to the complainant already – that may clarify the concerns she has raised regarding the response provided to date.
43. In response, the Home Office explained that whilst its initial response did not specifically answer the request, it could provide the following clarification: Each establishment has a single nominated local inspector. However any one of the Inspectorate may be involved with issues at any one of the establishments as and when required. This is managed on a case by case basis dependent on any situation requirements (absences, special expertise, number of applications etc).
44. In light of the Home Office's clarification, in the Commissioner's opinion it is reasonable to conclude that it has provided all of the recorded information it could be expected to hold falling within the scope of the request 4.

Section 17 – refusal notice

45. When refusing a request for information a public authority in line with the requirements of section 17 of FOIA a public authority must provide a requestor with a copy of a refusal notice. Such a notice must include details of any exemptions being relied upon by the public authority and, in order to comply with section 17(7)(a), must:

'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'.

46. In this case, the Home Office's response of 22 August 2012 omitted some of the wording which explained how the complainant could ask for an internal review. The complainant explained that this error caused her significant confusion with regard to how she could complain about the Home Office's initial response.
47. The Commissioner understands that the Home Office's failure to provide complete details of its internal review procedure in the letter of 22 August 2012 was due to an administrative error. However, by failing to provide complete details of the procedure for requesting an internal review the Commissioner finds that the Home Office breached section 17(7)(a) of FOIA.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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