

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 July 2024

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

#### Decision (including any steps ordered)

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1. The complainant has requested copies of "Assessment of a Request for Prospective Authorisation of a Regulatory In Vivo Test<sup>1</sup>" forms from the Home Office. The Home Office disclosed some information but withheld the remainder, citing sections 44(1) (Prohibitions on disclosure), 40(2) (Personal information) and 38(1) (Health and safety) of FOIA; it also advised that one form could not be located. The complainant agreed that any information withheld under sections 40 and 38 of FOIA could be properly withheld. The Commissioner has considered the applicability of section 44(1) of FOIA and whether or not the missing form is held.
2. The Commissioner's decision is that, on the civil standard of the balance of probabilities, the form that could not be located is not held. He also finds that, where cited, section 44 is properly engaged. The Commissioner does not require any steps.

#### Request and response

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3. On 17 May 2023, the complainant wrote to the Home Office and requested the following information:
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<sup>1</sup> Prospective Authorisation (PA) assessment forms authorise tests for project licences.

“Would you please let CFI [Cruelty Free International] have the completed Assessment of a Request for Prospective Authorisation of a Regulatory In Vivo Test (or equivalent document) in respect of each of the project licences granted for testing on animals substances used in cosmetics products since (and including) February 2019? This follows the change to the Home Office policy for cosmetics animal testing in that month and the request relates to licences granted under the changed policy.

Dr [name redacted] exhibited one such assessment to her witness statement dated 19 January 2023 in the recent judicial review (but it was almost completely redacted); and documents disclosed in the case referred to other cases where a licence had been granted (see, for example, pages 1183-1186 of the agreed bundle for the hearing on 18 and 19 January 2023).

There should be no difficulty in identifying the assessments but do let me know if you think the request needs to be more focused.

CFI is of course aware of section 24 ASPA [Animals (Scientific Procedures) Act 1986]. However, as you know this can only apply in respect of information given to (inter alia) the Home Office, not to information the department has itself generated.

The information can be provided in anonymised form”.

4. On 11 July 2023, the Home Office responded. It provided some information within the scope of the request but refused to provide the remainder, citing sections 44(1), 40(2) and 38(1) of FOIA. It also advised that it was unable to locate one form which covered two project licences.
5. The complainant requested an internal review on 21 August 2023. Regarding the citing of each exemption, he said that he did not wish to see information that would identify anyone, so section 40 was not relevant. He was happy for licence numbers to be redacted if the Home Office thought disclosure might lead to identification of an establishment, ie the citing of section 38. And, regarding section 44, he said that the requested forms: “represent the department’s analysis of whether the statutory tests for the grant of project licences have been met. The analysis has not been given to the department by anyone. If and to the extent that the analysis specifically refers to information given to the Home Office in confidence, section 24(1) [of ASPA] could apply to it; but not to other information”.
6. The Home Office provided an internal review on 6 December 2023 in which it maintained its position.

## Scope of the case

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7. The complainant contacted the Commissioner on 5 March 2024 to complain about the way his request for information had been handled. His detailed grounds included the following paragraph outlining his position:

“Apart from licence numbers, personal data and the identity of establishments, CFI seeks all the information in the five authorisation assessments which has not already been disclosed, plus the equivalent information in the assessment representing the other two licences referred to in the initial response if the Home Office is able to locate it”.

8. The Home Office has stated to the Commissioner that section 38 has: “only been applied to withhold licence numbers contained within the PA assessment forms”. As the complainant has already indicated that these can be withheld, section 38 will not be further considered. Both parties are happy for personal information to be withheld so the Commissioner will also not consider the citing of section 40.
9. The Commissioner will consider whether the form that cannot be located, is held, below. He will also consider the citing of section 44 for the remaining withheld information. He has viewed the withheld information.

## Reasons for decision

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### Section 1 – General right of access

10. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
11. In this case, the complainant suspects that the Home Office holds information (ie a particular form covering two project licences) which it could disclose. The Home Office’s position is that it does not.
12. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant’s request.

13. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
14. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the Home Office holds the project licence form it has failed to locate. Accordingly, he asked it to explain what enquiries it had made in order to reach the view that it did not hold this information.
15. In responding to the Commissioner's enquiries, the Home Office explained:

"The Animals in Science Regulation Policy Unit [ASRU], who would hold the (electronic) form have searched all records for the final form (as described above). A complete version of the PA [Prospective Authorisation] form has not been found, so we conclude that that this part of the information requested is not held.

The search process has been overseen by the Head of ASRU and conducted by the Regulatory Delivery Transformation Manager. Officials within the Regulator, including relevant Inspectors have been consulted. The material held is all electronic. Relevant electronic (Sharepoint) file stores have been thoroughly checked using all reference numbers and key words in the search strategies. Email records of all relevant individuals have also been searched using reference numbers and key words (including substance names, establishment names and individuals) in the search strategies. In addition, the establishment in question was contacted to check on email returns to Inspectors – this search yielded only known emails and documentation from ASRU's local searches.

No data is held on personal computers by officials and no data is manually inputted. There is no reason to suggest any material has been deleted or destroyed since the form is part of the regulatory function".

### **The Commissioner's conclusion**

16. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set

out in the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.

17. In a case such as this, the Commissioner's role is simply to decide whether or not, on the balance of probabilities, the public authority holds the requested information.
18. While appreciating the complainant's frustration that the Home Office has been unable to locate this information, the Commissioner is mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)<sup>2</sup> which explained that FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

19. The Commissioner considers that the Home Office contacted relevant staff to consider whether or not any information was held in respect of the missing form. Based on the information provided the Commissioner is satisfied that, on the balance of probabilities, this form is not held. He is therefore satisfied that the Home Office has complied with the requirements of section 1 of FOIA in respect of this document.

#### **Section 44 – Prohibitions on disclosure**

20. Section 44(1) of FOIA states: "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 retained EU obligation, or (c) would constitute or be punishable as a contempt of court."
21. The Commissioner considers that the "otherwise than under this Act" provision means that any obligation to disclose under FOIA itself must be disregarded.
22. In other words, although FOIA creates a duty for public authorities to provide information on request, there are prohibitions on disclosure created by other legislation, retained EU obligations and contempt of court.

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<sup>2</sup><http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

**Is disclosure of the requested information prohibited by or under any enactment?**

23. Information is exempt under section 44(1)(a) of FOIA if its disclosure would breach any of the following:

- primary legislation (an Act of Parliament); or
- secondary legislation (a Statutory Instrument).

24. The legislation cited in this case is ASPA. Specifically, the Home Office considers that section 44(1)(a) applies on the basis that there is a prohibition on disclosure in section 24 of ASPA.

25. Section 24(1) of ASPA states:

“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”.

26. Explaining why it considers that the forms are governed by section 24 of ASPA, the Home Office said:

“We consider that section 24 applies to all Home Office staff carrying out a function under ASPA and the statutory independent advisory Animals in Science Committee (who receive information from the Home Office to perform their functions).

The relevant sections of ASPA are sections 5 to 5G, regarding project licences. A PA form functions as a request to amend a project licence and contains information provided by the applicant in confidence during the application process. This includes information about the specifics of their scientific work, commercial interests and intellectual property. This information is all considered to have been given to the Home Office in confidence.

We recognise that, as [the complainant] has pointed out, section 24 can only apply to information which has been obtained by the Home Office from external sources and which has been given in confidence.

All sections of the form up to and including section 8 are completed by the applicant. The Home Office considers that all the information that is provided in those sections of the form in [sic] provided in confidence.

The information redacted in sections 9 and 10, with the exception of personal information, is also information provided in confidence.

We have disclosed to [the complainant] the information provided at sections 9 and 10 of the forms where it is not considered to be information provided in confidence and hence does not attract section 24 of ASPA. We consider that all other information at sections 1 to 10 of the forms meets the conditions in section 24 and hence is exempt under the absolute exemption at section 44(1) of the FOIA.

We would draw attention to the Commissioner's recent decision in IC-242999-K2D1<sup>3</sup>, in which the Commissioner found that the Home Office was entitled to rely on section 44(1)(a) of the FOIA to withhold similar information provided in confidence under ASPA".

### **The Commissioner's view**

27. To engage section 44(1)(a) of FOIA, the public authority needs to demonstrate that disclosure of the requested information is prohibited under another piece of legislation – in other words, there should be an enforceable legal prohibition acting as a statutory bar to disclosure under FOIA of that information.
28. The Commissioner has taken into account his findings in the decision notice referred to in footnote 2, which he will not repeat here, and has considered the wording of the relevant statute and the source of the redacted content in the forms.
29. In light of his findings that the Home Office has ASPA functions, that it obtained the information in the exercise of those functions and knows, or has reasonable grounds for believing, the information to have been given in confidence, by disclosing it, the Home Office can commit an offence under section 24(1) of ASPA and so section 44(1)(a) of FOIA does apply.
30. As section 44 is an absolute exemption, there is no need to consider the public interest.

### **Other matters**

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31. Although they do not form part of this notice the Commissioner wishes to highlight the following matters.
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<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027198/ic-242999-k2d1.pdf>

## **Information Notice**

32. As the Home Office failed to respond to the Commissioner's enquiries in a timely manner it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner's website.
33. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual<sup>4</sup>.

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<sup>4</sup> [https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1\\_0.pdf](https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf)



## **Right of appeal**

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34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Carolyn Howes**  
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