

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 31 March 2009

Public Authority: University of Oxford
Address: University Offices
Wellington Square
Oxford
OX1 2JD

Summary

The complainant requested information held by several Universities, including Oxford University (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 withheld the information under section 38 (health & safety) of the Freedom of Information Act 2000 (the "Act"). During the Commissioner's investigation it later varied this to also include section 14 (vexatious or repeated requests), section 40 (personal information) and section 43 (commercial interests). The public authority subsequently withdrew its reliance on sections 14 and 40(2).

Following a partial disclosure during the course of his investigation, the Commissioner finds that the second part of the request was met in full. In respect of the first part of the request the Commissioner finds that sections 38 and 43(2) are not engaged. The complaint is therefore partially upheld.

The Commissioner further finds that the public authority breached sections 1(1)(b), 10(1) and 17(1)(a)(b) & (c).

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. On 25 August 2006 the public authority responded stating that it believed the information to be exempt under section 38.
4. On 12 December 2006 the complainant requested an internal review.
5. On 16 January 2007 the public authority responded to the request for an internal review. It upheld its earlier refusal.
6. Following further communication with the Commissioner the public authority later sought to also introduce the exemptions at sections 14(1), 40(2) and 43(2) and. It also advised the complainant of these changes.

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 section 38 as the basis for refusing the request.
 9. 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.

Chronology

10. On 11 September 2007 the Commissioner wrote to the public authority to advise it that he had commenced his investigation. He pointed out that the requests had been fully answered by other Universities, i.e. some had confirmed that primates were in use and the nature of the research. He therefore queried why the public authority believed it was exempt under section 38.
11. At the same time, the Commissioner wrote to the complainant to advise it that he was now investigating all six complaints.
12. 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.
13. The public authority sent in its arguments in respect of its reliance on section 38 on 31 October 2007. In this correspondence it additionally stated that if the Commissioner did not agree that the information was exempt under section 38 it wished to "*reserve the right*" to introduce the exemptions at sections 14, 40 and 43
14. Following further correspondence with the Commissioner the public authority clarified that it did wish to rely on these additional exemptions and it sent in its fuller arguments on 13 March 2008. Following a request from the Commissioner it also advised the complainant of these additional exemptions on 25 March 2008 to allow it the opportunity to counter its arguments. The complainant provided its submissions to the Commissioner on 8 April 2008.

15. On the 26 August 2008 the Commissioner clarified with the complainant that this was the only request under the Act that it had ever made to this public authority.
16. On the 27 August 2008 the Commissioner raised some further issues with the public authority regarding some information it had already supplied to the complainant. This was in view of a statement it had previously made about its use of animals in various fields of research. The Commissioner wished to clarify whether this research involved animals in general or if it was specifically using primates. On 15 September 2008 the public authority clarified that this statement concerned animals in general but also advised the Commissioner that it was happy to supply a similar statement which was specific to its use of primates which it included in its response, along with the species of primates in use.
17. With the public authority's consent the Commissioner passed this information to the complainant on 15 September 2008 with a view to informally resolving this part of its request. On 17 September 2008 the complainant responded and said that the response was not adequate and that it expected more detail.
18. Following further contact with the Commissioner the public authority decided that it no longer wished to rely on either section 14 or 40(2) in respect of the first part of the request. The Commissioner was advised of this on 16 December 2008.
19. 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.
20. As part of his investigation the Commissioner conducted broad internet searches in order to identify what information was already in the public domain about the public authority's research using primates.

Background

21. 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.

22. 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.
23. 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 are a necessary condition of being granted a licence under ASPA. A nil return is required if no work is undertaken.
24. 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.
25. The statistics subject to this request cover returns for 2004 and 2005 which were published in December 2005 and July 2006 respectively.
26. 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.
27. 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.
28. 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).
29. 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.
 30. 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.
 31. 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

32. The full text of the relevant sections of the Act can be found in the Legal Annex at the end of this notice.

Procedural issues

Section 11- means by which communication is made

33. Section 11 (1) of the act provides that where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely – the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,

- a) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
 - b) 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 is reasonably practicable give effect to that preference.
34. In this case the complainant did specify his preferred format, that being a summary, at the time of making his request.
35. During the course of his investigation Commissioner sought to informally resolve the case. In doing so the public authority agreed to provide some further information concerning the second part of the request to the complainant about its current research and the species of primate in use. Having subsequently passed this information through to the complainant, the Commissioner asked for its consideration as to whether or not this part of its request was now satisfied. By way of response it informed him:
- “The minimum that would constitute a ‘summary’ would include the following information, broken down by programme of research (most obviously represented by project licences issued under section 5 Animals (Scientific Procedures) Act 1986*
- *whether the research is basic (fundamental) or applied*
 - *where relevant, the disease in question and what the research is aimed at finding out*
 - *where there is no relevant disease, a brief description of the subject-matter and objectives of the research*
 - *the body system in question (eyes, brain etc)*
 - *the type of experiment (behavioural observation, toxicity testing, disease progression, brain surgery etc)*
 - *whether rhesus or cynomolgus macaques were used.”*
36. When it raised its original complaint with the Commissioner the complainant provided him with examples of responses it had received, and accepted as adequate, from two other universities which had been sent this same request. One of these examples was fairly concise, the other more detailed. Whilst it may have had a preference for the more detailed response the complainant did, nonetheless, accept the concise summary without any further objection and provide this to the Commissioner as evidence that responses had been sent to it by some universities.
37. In light of this, the Commissioner compared the summary he had been provided by the public authority during his investigation alongside the two examples the complainant had provided as evidence. Whilst he understands that a more detailed summary may have been preferred, he

- considers that the summary offered by the public authority was comparable to the concise one which the complainant had previously accepted.
38. The Commissioner considers that the summary suggested by the public authority in paragraph 35 above would contain considerably more detail than the information covered by the original request. The Commissioner believes that the 'lower' threshold which had previously been accepted by the complainant from a different university was an acceptable and adequate response. Therefore, in his view the information provided to the complainant by the public authority in this case was in fact an appropriate response to the original request that was made. The Commissioner does not therefore agree with the complainant that the public authority should be required to disclose further information in respect of the second part of the request.

Section 17 – refusal of request

39. 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.
40. In this case, the public authority stated that it was relying on section 38 but failed, by the time of the completion of the internal review, to specify which sub-section of the exemption it was relying on. It therefore breached section 17(1)(b).
41. The failure of the public authority to state that it was relying on the exemption at section 43(2) means that it was in breach of section 17(1)(a)(b) & (c).

Exemptions

42. As the Commissioner is satisfied that the public authority responded to the second part of the request, he has only proceeded to consider the application of the exemptions to the first part of the request.
43. The public authority's arguments, which have been italicised for each exemption cited, were originally given in respect of both requests.

Section 38 – health & safety

44. 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. Although the public authority did not state the relevant subsection being relied on to the complainant it later confirmed to the Commissioner that it had withheld the information under subsection (1)(a) and (b).
45. 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. 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.
46. 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.
47. In support of its contention that section 38 was engaged at the time of the request the public authority originally informed the complainant that: "*In view of the long and sustained campaign by animal activists against the University's building of its new biomedical research support building, it is the University's view that disclosing information relating to its use of animals in research (other than that specifically made public on its own website) will increase the risk to individuals of violence and intimidation by animal rights activists. The University has a duty to protect the safety of its staff, students and others connected with the University and strongly believes that, in the current circumstances, the public interest in protecting*

individuals from harm outweighs the public interest in disclosure of the information requested.”

48. It further stated to the complainant that: *“There is no doubt ... that violence has been directed against the University, and those connected with it, by activists willing to use any means at their disposal to prevent completion of the new medical building. Any additional information about the University’s research involving the use of animals , beyond that already in the public domain, could be used as a pretext to instigate or escalate activity against individuals. The actions already taken by activists have been of a very serious nature, ranging from noisy and intrusive demonstrations to attacks on individuals and their property, including arson attacks on buildings of the University and colleges. These activities have been widely reported in the media, and have led, understandably, to a heightened sense of fear amongst those who might be the subject of an attack. The risk does not arise because of the nature of the research but because of the actions of those wishing to prevent the University from carrying out the research.”*
49. 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.
50. The public authority’s further arguments in respect of section 38 are summarised below.
51. The public authority initially argued that *“The University has never denied using non-human primates in biomedical research, and that is not the reason for our decision to refuse the request under section 38. Rather, it relates to the increased risks likely to arise to individuals from disclosure of the information.”* It further stated that *“It is accepted that there is a generalised risk to all those engaged in animal-based research from some animal rights activists, though we would argue strongly that there ought to be no greater risk to researchers undertaking work of this kind than undertaking any other kind of research. The primary risk only arises in the first place because of the actions and threats of the activists.”*
52. The Commissioner fully acknowledges the points made by the public authority. However, he notes that they do not in themselves amount to evidence why release of the information requested would itself increase the risk to any individual’s health and safety.
53. The public authority went on to state that *“... the risks that we considered when refusing the request relate to the specific and sustained campaign that has been directed against this University since 2004, when work began on the construction of a new biomedical research support building.*

This campaign has posed, and continues to pose, a very real and substantial threat to individuals. There have been attacks on staff and those connected with the University, including contractors, suppliers and funders. University staff have been visited at home and threatened. There have been attacks on property, including arson attacks on buildings of the University and its colleges.” It also provided evidence which included two statements from the Oxford Student Newspaper of 25 October 2007 when the spokesman for the Animal Liberation Front is quoted as saying that its members ‘*would take unlawful actions to stop the lab’s operation*’ and would attack it ‘*by whatever means necessary, including criminal damage and arson*’. It also advised the Commissioner that the leader of SPEAK is similarly quoted as saying that “*In the days and weeks after the lab opens, there will be a battle that we will take to the University and the lab. Our tactics are evolving. Only one thing is clear: we won’t go away. As far as we are concerned, we’ve only just started.*” (The Commissioner notes that this date of this publication is later than that on which the request was made but he has cited it as it demonstrates that such threats have continued to post-date the request, thereby evidencing that the associated risks were indeed on-going at the time of the request).

54. Much media attention has focused on the ‘animal rights’ action at the site of the public authority’s new biomedical research centre, both preceding and post-dating the request, as mentioned by the public authority. However, the Commissioner can find no reason to suggest that the release of the information requested by the complainant would be used to further fuel demonstrations or militant actions. It is known that this building is to be used for animal research so he considers it will be a likely focal point for those intent on causing harm or disruption; and, presumably, it is likely to remain so throughout its lifetime.
55. The Commissioner accepts that the public authority remains a current, active target as a result of it building a new research facility because of the evidence it has provided by way of press cuttings and web site information. He understands that there is a ‘*sustained campaign*’ which continues to pose a ‘*very real and substantial threat to individuals*’. However, he notes that this activity is on-going regardless of this information request. It is obvious that the public authority’s intention is to continue such research or there would plainly be no need to invest in a new building. The quotes provided above from the Oxford Student Newspaper post-date the request by more than a year so clearly evidence this on-going threat. However, the Commissioner can see no evidence to suggest that the current threat would increase with the release of the information requested. The public authority has not given specific arguments as to why this threat would increase if it were to divulge the numbers and species of primates as provided in its last two annual returns.

56. The Commissioner also understands that the public authority has a duty of care to its staff and students and that it would be failing in this duty if it were to act in any way that might heighten this risk. The public authority has further expanded on this by saying *“It is immaterial if the risk is judged to be small or if it is difficult to specify. If the University’s actions gave rise to an additional risk, however small, when there was another feasible option available, it would potentially be in breach of its obligations.”* However, when assessing the likelihood of risk to the health and safety of any individual the Commissioner has already explained above that although the risk of prejudice or endangerment need not be more likely than not, it must be substantially more than remote. He does not consider that the information requested affords a level of risk which is substantially more than remote.
57. The public authority has referred to ‘*misinformation*’ being cited by animal rights extremists (AREs) to try to ‘*galvanise*’ support. The Commissioner understands that the subject matter is very controversial and there will always be parties who interpret available information to serve their own cause.
58. It has also commented that although the complainant is committed to peaceful methods of campaigning that the information requested could easily become generally available in ARE circles. The Commissioner accepts that disclosure to the complainant is not to it personally and, as such, neither the complainant nor the public authority can control how the information is used in future if disclosed.
59. The public authority has stated that *“The request is for information about the use of primates by particular academic institutions, not for generalised information about the use of primates in scientific research... This information would enable the activists to make comparisons between different institutions and to target those that, in their eyes, were the worst offenders. They might decide, for example, to draw up a ‘league table’ of primate users, ranking universities according to their use of primates in scientific research. The first part of the request - numbers of animals recorded in Home Office statistical returns - is one obvious indicator of the scale of a university’s activity in this area.”* It has further said that *“The institution with the greatest level of activity is likely to be the activist’s main target. Conversely ... those with the smallest numbers might also attract attention, since they might be regarded as relatively soft targets that might be more susceptible to pressure. As a result this information could be used in such a way that it would pose a potential increased threat, not only to those in the individual institutions who are carrying out the research in question, but to those in the academic sector as a whole, and indeed to the pursuit of lawful medical research.”*

60. 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 which the public authority has already provided. He also notes that only a small number of universities have been asked rather than all UK universities so the information would not only be historical but would be limited to those establishments which were approached., Estimates regarding the likely historic numbers of primates which have been held by individual universities would also be possible to some extent based on published research which was already available.
61. The Commissioner further notes that the public authority itself has not been clear as where it considers the most risk would or would be likely to occur. It has stated that both the *greatest level of activity is likely to be the activist's main target* and, conversely, that *those with the smallest numbers might also attract attention*. As he has previously mentioned, the Commissioner considers that any prejudice to an individual's health and safety must be substantially more than remote.
62. The Commissioner considers that the disclosure of information in respect of previous returns cannot create any more risk than is already in existence. The information requested is very limited and the published research he has viewed contains much more detail. In addition, the species of primates used are already limited to the few species identified in the published Home Office annual returns. He further believes that, if they so wished, activists are already in a position to target institutions by publicising and commenting on research as it is published.
63. The public authority has also provided the Commissioner with its views regarding the public interest in releasing the information. However, the Commissioner notes that whilst such comments are necessary when considering the public interest for or against disclosure, they are not relevant when considering the likelihood of endangerment to the health and safety of any individual. He has not therefore needed to consider such arguments.
64. 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 “*never denied using non-human primates in research*”.

65. The Commissioner has concluded believe that disclosure of the information requested by the complainant’s first question would not add to any existing health and safety risk. The public authority has provided its own evidence which demonstrates that it was already a target prior to this request and that the risk continues to exist.
66. 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

67. The public authority also sought to rely on section 43(2). This provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
68. 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 and the willingness of researchers to apply for its projects.
69. 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.
70. The public authority has argued that, in its view, disclosure “*would be likely to prejudice its commercial interests by impeding its ability to carry on its legitimate business*”. 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.” (paragraph 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.

71. In support of its submission that section 43(2) applied to the withheld information the public authority has cited the following:

"It is the University's view that the release of both pieces of information requested by the complainant is likely to lead to increased activity by animal rights extremists against this University, including further violence, intimidation and abuse, which in turn is likely to deter scientists from engaging in animal-based research at Oxford, leading to a loss of research income and commercial opportunity. Existing animal users may consider moving to other institutions, possibly overseas, where there is no threat or a lesser threat from animal rights extremists. Animal users from other institutions that the University wishes to recruit might be put off. It is the University's view, therefore, that the disclosure of this information (both parts) should be withheld under Section 43(2), as it would be likely to prejudice its commercial interests by impeding its ability to carry on its legitimate business i.e. research, such research including work on life-threatening or life-limiting diseases."

72. The public authority has further stated that "...the campaign against Oxford is a matter that prospective recruits frequently raise" and that ARE threats are a factor which can cause prospective researchers to have serious doubts about whether or not to engage in such work.
73. It additionally added that: "Some biomedical research has direct commercial potential and a number of the spin-out companies created by the University are from this sector." The public authorities spin-out companies can be viewed online at <http://www.isis-innovation.com/spinout/> .
74. In *Hogan v Oxford City Council & The Information Commissioner* 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."
75. The Commissioner has considered the public authority's arguments very carefully. In respect of the complainant's first question he does not consider that the release of numbers / species of primates in previous returns could impact on the commercial interests of the public authority in any meaningful way as it only covers historic numbers and species of primates.
76. The public authority has advised the Commissioner that there is an on-going campaign against animal research and that potential researchers already voice their concerns when considering where to undertake their work. Whilst he accepts these arguments, the Commissioner notes that the public authority is already a target for ARE activity and he therefore

- does not agree that the release of the further information requested will increase this risk. He believes that both current and potential researchers are already aware of the risks they face when considering this type of work and that this remains an on-going risk. He does not agree that researchers would be encouraged to go elsewhere any more so than they already are.
77. The Commissioner was advised that the public authority was ranked third in the world in the Times Higher Education Supplement's list of top 100 biomedical universities in 2006 and also that it is a main recipient of funding from one of the largest biomedical research fund providers. The Commissioner does not accept that release of the information requested will affect this status. He cannot agree that releasing historical data would be likely to have the effect of restricting future funding.
78. The Commissioner is also not persuaded by the argument that release of the information requested will result in existing researchers moving elsewhere. He believes that researchers will be keen to go to what is deemed to be a high ranking institution with the latest facilities, i.e. a new biomedical facility. Nor is he persuaded by the public authority's statement to him that: "... *there is an overriding public interest that it should not be needlessly exposed to greater risk*".
79. For the reasons set out above, the Commissioner is not satisfied that the public authority has provided sufficient evidence to suggest that a response to the first request made by the complainant would be likely to prejudice its commercial interests. He is therefore of the view that section 43(2) is not applicable to the withheld information.

The Decision

80. The Commissioner's decision is that the public authority complied with the second part of the request.
81. However, although it subsequently provided a summary in respect of the second part of the request this was done beyond the statutory twenty day limit. This is therefore in breach of sections 1(1)(b) and 10(1).
82. The Commissioner has also decided that the public authority has not dealt with the request for information in accordance with the Act in that:
- By failing to specify which sub-section of section 38 it was relying on by the time of the completion of the internal review it breached section 17(1)(b).

- The failure of the public authority to state that it was relying on the exemption at section 43(2) means that it was in breach of section 17(1)(a)(b) & (c).
- The public authority inappropriately withheld the first part of the requested information under sections 38(1) and 43(2). In doing so it is in breach of sections 1(1)(b) and 10(1).

Steps Required

83. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.
- The requested information in respect of the first request for information should be released to the complainant.
 - The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other Matters

84. The Commissioner notes that although the public authority advised the complainant of its rights to appeal to him for a decision notice it did not include detail of how to contact his office. Whilst this is not a breach of the Act as a matter of good practice he considers that his contact details should be provided.
85. The complainant was unhappy with the Commissioner's late acceptance of additional exemptions in this case, namely sections 14, 40(2) and 43(2). The Commissioner was first made aware by the public authority that these were potential grounds for refusing the information on 31 October 2007 when it said it '*would reserve the right*' to cite them if its reliance on section 38 was not upheld. It was not until some time later that the Commissioner invited the public authority to submit its arguments when he noted that its reliance on section 38 was likely to be overruled. The Commissioner afforded the complainant equal opportunity to counter the additional arguments made.
86. The Commissioner would not generally advocate that public authorities keep other exemptions 'in reserve' for later citation and he agrees with the complainant that this is generally an unacceptable way for a public authority to approach its duties under the Act. However, whilst he may not

always take 'late' arguments into consideration the issues surrounding this case related to health and safety and, in these particular circumstances, he considered it to be appropriate. This may not always be the case and each complaint will be dealt with on a case-by-case basis.

87. 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

88. 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 his request for information, the applicant expresses a preference for communication by 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 shall so far as is reasonably practicable give effect to that preference.
- (2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by a particular means, the public authority may have regard to all the circumstances, including the cost of doing so.
- (3) Where a public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.
- (4) Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.

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.

(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.

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(2) provides that –

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).