NCN: [2024] UKFTT 001007 (GRC) **Case Reference: EA-2023-0485**

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: By CVP
Heard on: 20 May 2024
3 October 2024

Decision given on: 6 November 2024

Before

T NAL JUDGE SOPHIE BUCKLEY

TRII L MEMBER DAN PALMER-DUNK

TI JAL MEMBER STEPHEN SHAW

Between

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE HOME OFFICE

Respondents

Representation:
For the Appellant: Mr Richardson (Counsel)
For the First Respondent: Did not appear
For the Second Respondent: Mr Knight (Counsel)

Decision:

1. The appeal is **Dismissed**.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-242999-K2D1 dated 24 October 2023 which held that the Home Office were entitled to withhold the requested information under section 44(1)(a) (prohibitions on disclosure) and section 38(1) (health and safety) of the Freedom of Information Act 2000 ('FOIA').

2. This appeal was originally listed for hearing on 20 May 2024. The Commissioner did not attend, and the Home Office were not at that stage a party. Mr. Radcliffe who attended on behalf of the appellant was not in a position to make substantive submissions and simply adopted the written submissions.

3. The hearing was adjourned part-heard for the reasons given in the tribunal's order of 21 May 2024. The Home Office has since been joined as a party and has provided a response to the appeal and written submissions.

4. The appellant has confirmed that she is content for licence numbers to be redacted and therefore section 38 is no longer in issue.

5. Section 21, although initially relied on by the Home Office, is no longer in issue because the information to which it was applied was not within the scope of the request.

Factual and legislative background

6. The Animals (Scientific Procedures) Act 1986 (ASPA) regulates procedures that are carried out on 'protected animals' for scientific or educational purposes that may cause pain, suffering, distress or lasting harm. ASPA also regulates the breeding and supply of certain species of animals for use in regulated procedures or for the scientific use of their organs or tissues.

7. Section 24(1) ASPA provides:

> **"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."

8. The Animals in Science Regulation Unit (ASRU) is a unit of the Home Office that is responsible for implementing ASPA and comprises inspectors, licencing officers and those responsible for policy.

9. A project licence must normally be held for any programme of work involving those procedures regulated by ASPA. Project licences are issued by the Home Office.

10. An application for a project licence must be accompanied by a project summary. A project summary is defined in section 5A (2) and(3) ASPA:

> "(2) A project summary is a statement, in non-technical language, which (subject to subsection (3)(a))—
>
> (a) describes the proposed programme of work and states the objectives of the programme, the predicted harm and benefits of the programme and the number and types of animal to be used in the programme;
>
> (b) demonstrates that the proposed programme of work would be carried out in compliance with the principles of replacement, reduction and refinement.
>
> (3) A project summary must not contain—
>
> (a) any information of a confidential nature or any information the publication of which may lead to the infringement of any person's intellectual property rights;
>
> (b) names or addresses or any other information from which the identity of the applicant or any other person can be ascertained."

11. Where a project licence is granted the Secretary of State is required by section 5D(6) ASPA to publish a copy of the project summary.

12. The project summary is referred to by the parties and in this decision as a 'non-technical summary' or NTS.

13. ASRU publish guidance on how ASPA will be administered and enforced for new licence applicants as well as holders of licences entitled Guidance on the Operation of the Animals (Scientific Procedures) Act 1986 'the Guidance').

14. As well as the non-technical summary and the Guidance, the Home Office publishes annual statistics on the number, type and purpose of all scientific procedures using animals and annual reports detailing regulatory activity and anonymised non-compliance cases. It also publishes retrospective assessments.

15. is described by her representative as 'an ardent peaceful advocate for animal rights within the UK' and she seeks greater transparency from organisations known to conduct animal testing within the UK under regulation. One of her concerns is that the non-technical summaries do not contain the detail that they should in order to provide sufficient transparency.

Request

16. On 26 February 2023 the appellant made the following request to the Home Office:

> "Please may I have redacted project licences for the following:
>
> Volume 2 of Non Technical Summaries for 2019 which can be found at: [link]
>
> Pages 591 - 596 Provision of Biological Materials (170 dogs) – 5 Years
>
> Volume 2 of Non Technical Summaries for 2020 which can be found at: [link]
>
> Project 200 Pages 1459 – 1466 Toxicology of Pharmaceuticals (4000 beagles) – 5 Years."

17. The Home Office responded on 12 April 2023. It supplied two project licences, from which it had redacted certain information that it withheld under section 44(1)(a) FOIA (prohibitions on disclosure) in reliance on section 24 ASPA and under section 38 FOIA (health and safety). It withheld the non-technical summaries under section 21 FOIA (information in the public domain).

18. The Home Office upheld its position on internal review.

Decision notice

19. In a decision notice dated 24 October 2023 the Commissioner held that sections 44(1)(a) and 38(1) were engaged and that, in relation to section 38, it was in the public interest to withhold the information. The Commissioner did not consider section 21.

20. The Commissioner was satisfied that the Home Office had functions under ASPA in that the Secretary of State grants project licences under section 5 ASPA. The Commissioner was satisfied that the requested information was obtained by the Home Office in the exercise of those functions because it was obtained in connection with the exercise of its licencing function.

21. The Commissioner accepted that the information provided included information about the specifics of the applicant's scientific work. Given the nature of the information and that the applicant is required to provide such information as part of the application process, the Commissioner concluded that the Home Office knew or had reasonable grounds for believing that the information was provided by the applicant with an expectation of confidence.

22. On that basis the Commissioner concluded that the information was exempt under section 44.

23. The Home Office relied on sections 38(1)(a) and (b) to withhold the licence numbers contained within the project licence documents. The Commissioner concluded that section 38 applied on the basis of the reasoning that he had given in case reference IC-177442-Q4D0.

Grounds of appeal

24. The Grounds of Appeal are, in summary, that the decision notice was wrong because:

    24.1. The Commissioner was wrong to conclude that section 44 was engaged.

    24.2. The Commissioner was wrong to conclude that section 38 was engaged.

    24.3. The Commissioner failed to consider the public interest balance under section 38.

    24.4. Section 21 was not engaged because the appellant had not asked for the non-technical summaries.

25. The appellant accepts that the establishment name, staff names and 'any intellectual property rights' would be redacted.

26. The appellant asserts that section 24 does not restrict access to information because it came into force prior to FOIA. Further the appellant notes that it is subject to a government consultation.

27. The appellant submits that the Home Office has, without reasons, responded inconsistently to similar FOI requests.

28. It is submitted that there is a particular public interest in transparency because the information relates to the welfare of animals.

The Commissioner's response

Section 44

29. Whilst the Home Office's functions are not defined in ASPA, the Commissioner was satisfied that the Home Office has ASPA functions on the basis that it is the Secretary of State who has the authority to grant a licence under ASPA. The Commissioner submitted that it was clear that the requested information was obtained by the Home Office in the exercise its ASPA functions.

30. The Commissioner noted that the project licence contains information about the specifics of the applicant's scientific work. It is submitted that it is therefore clear that the Home Office knew or had reasonable grounds for believing that the information has been given to it with an expectation of confidence. The Commissioner stated that the information was required to be provided to the Home Office as part of the application process.

31. The Commissioner submitted that any plain reading of the withheld licences demonstrates that all the information therein has been provided in confidence. Each request is considered on a case-to-case basis.

32. The Commissioner submits that it is not within his remit to comment on the consultation.

Section 38

33. The Commissioner was satisfied that the disclosure of the licence numbers would potentially allow others to de-anonymise the information released.

34. The Commissioner submitted that the public interest balance is the same as set out in IC-17742-Q4D0.

Section 21

35. The Commissioner stated that he does not understand the appellant to be seeking disclosure of the non-technical summaries. Further this was not raised in the appellant's complaint to him.

36. To the extent that it is now raised the Commissioner invites the tribunal to consider joining the Home Office to the appeal.

Reply of the appellant

37. The reply was drafted by Adam Richardson, Counsel.

38. It is not necessary to set out the submissions in relation to section 38 as this is no longer in issue.

39. Mr Richardson confirmed that the appellant was not seeking disclosure of the non-technical summaries.

40. Mr. Richardson submitted that the purpose of a non-technical summary is to inform the public of the nature and purpose of the work being undertaken under the licence. Mr. Richardson argued that the reality is that non-technical summaries are now redundantly short and deliberately obfuscate the nature of the experimentation or the 'harm benefits'. It was submitted that non-technical summaries are used to mask annual suffering for an unknown purpose.

41. In relation to section 44 Mr. Richardson put forward that it cannot be right that information which is periodically released to the public can be considered to be confidential information. Further he submitted that it is manifestly unreasonable to apply a blanket policy that all information within an organisation will be considered confidential.

42. Mr. Richardson submits that the Commissioner has stated that all the information within a project licence has been provided in confidence, but does not state the nature of that confidence, to whom that confidence belongs or how he has been able to make that determination.

43. Mr. Richardson submits that the release of previous licences is relevant to the question of whether the information in licences is confidential.

44. Mr. Richardson asserted that ASPA was enacted a long time before FOIA and there exists a tension between the two. He drew the tribunal's attention to a report of a House of Lords Select Committee in 2002 into Animals in Scientific Procedures which recommended the repeal of section 24.

45. Mr. Richardson submitted that it was 'somewhat confusing' that the Home Office has not relied on section 41 if it considers the information confidential.

Submissions of the Home Office dated 21 June 2024

46. The Home Office was directed to make submissions on three issues which it did as follows.

The state of mind of the official or other person in possession of the information and the basis for the assertion that he or she knew or had reasonable grounds for believing that the information was 'given in confidence'.

47. The Home Office asserted that it had a system in requiring an application to create a non-sensitive NTS project summary, alongside their sensitive and confidential application. It submitted that the NTS is a version with information *"of a confidential nature"* removed; therefore, by definition, it is

submitted that the information in the application but not in the NTS is given to the Home Office in confidence by the application.

48. The Home Office submitted that this is consistent with the privacy statement given to applicants.

The position at the time when the information was given

49. It was submitted that the evidence of Mr Reynolds reflects matters at the time the information was given to the Home Office, and accordingly the conditions of confidence under which it was received.

The intentions of the giver at that time, either as expressed or as reasonably to be inferred from the circumstances

50. It is submitted that the preparation of the non-confidential NTS is a clear indication of the matters which the applicant considered to be given under a condition of confidence. Applicants are aware of the way their information will be handled by provision of the privacy statement online with the application form.

Response of the Home Office to the appeal dated 5 August 2024

51. The Home Office's position on section 44 is as follows.

    51.1. **S**ection 44(1)(a) protects the disclosure of information which it would be contrary to any enactment to disclose.

    51.2. Section 24(1) ASPA provides that: "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."

    51.3. The exemption applies squarely to all information held by the Home Office, which was provided by the establishment in confidence.

    51.4. The above is also in accordance with the purpose of a project licence. Sections 5 to 5G of ASPA are the relevant sections regarding the granting of project licences, and specifically section 5A(3). Furthermore, the non-technical summary is written in lay terms specifically to aid public understanding and as part of the commitment to openness and transparency under ASPA. It is therefore in direct contrast to the Project Licence which provides technical details for the purpose of compliance with ASPA and therefore compliance with the regulator.

51.5. That the Government treats information provided in confidence is a matter of public record (see the speech of Lord Glenarthur to the House of Lords on the Animal (scientific Procedures) bill on 16 January 1986, Hansard, Col 1239) as well as in the privacy notice provided with the Animals in Science Procedure e-Licensing.

Evidence

52. We read an updated open bundle and a closed bundle. The updated open bundle included a witness statement dated 21 June 2024 plus exhibits from William Reynolds, Head of the Animals in Science Policy and Coordination Function (the Policy Unit) in the Home Office. We also heard oral evidence from Mr. Reynolds.

53. It remains necessary to withhold the information in the closed bundle from the appellant otherwise it would defeat the purpose of the proceedings.

54. Although a closed statement from Mr. Reynolds with closed exhibits was filed by the Home Office that evidence was only relevant to section 38, which is no longer in issue. The Judge therefore ruled, in a previous order, that the Home Office did not have permission to rely on that closed evidence, and it was not before the tribunal for the purposes of deciding the appeal.

55. We did not hold a closed session and heard no closed evidence or submissions.

56. We also had before us skeleton arguments from the appellant and the second respondent and an authorities bundle.

The law

Section 44

57. Section 44(1)(a) FOIA provides that information is exempt information if its disclosure is prohibited by or under any enactment. It is an absolute exemption so the public interest balance does not apply.

58. Section 24(1) of the Animals (Scientific Procedures) Act 1986 (ASPA) provides:

> **"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."

59. Section 24 ASPA is directed at the state of mind of the official or other person in possession of the information and raises the question of fact: does he know or have reasonable grounds for believing that the information was 'given in confidence'. It directs attention to the position at the time when the information was given, and to the intentions of the giver at that time, either as expressed or as reasonably to be inferred from the circumstances ([30] **BUAV v Home Office and Information Commissioner** [2008] EWCA Civ 870 (**BUAV**)).

60. The Court of Appeal made the following observations in **BUAV**:

> "Another source of difficulty has been the lack of any direct evidence or information about the viewpoint of licence-holders or applicants. Again, there may have been practical reasons for this, but it left a potentially awkward gap in the Home Office case. Until 1998 applicants were able to rely on a blanket assurance of confidentiality. When that was withdrawn, they were given no specific assurance as to how any particular category of information would be treated. Thereafter, one might have expected any applicant who was particularly concerned about confidentiality to have sought at least some clarification of the department's likely approach to information supplied by him. If there have been such exchanges, we know nothing about them. In the event the Commissioner felt able to infer from the limited material available that applicants would have had an "expectation of confidentiality" for information supplied by them. As we have said, that factual conclusion is not subject to challenge in this court."

The role of the tribunal

61. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

The issues

62. It is not in dispute that the requested information has been obtained by the Home Office officials in the exercise of the relevant functions.

63. The issue we have to determine is:

63.1. Did the relevant official at the home office know or have reasonable grounds to believe that the requested information was given to the Home Office in confidence?

The appellant's oral submissions/skeleton argument

Section 21

64. Mr Richardson confirmed that the appellant was not requesting the non-technical summaries.

Section 44

65. Mr. Richardson asserted that the law on section 44 was 'undecided'. He noted that the Court of Appeal had remarked that ASPA did not sit well with FOIA and submitted that there is no definitive test for what is considered 'confidential information'.

66. Mr. Richardson submitted Mr. Reynolds' evidence showed that 'such matters' were no longer covered by a blanket policy of confidentiality, but the approach had shifted to a case-by-case basis.

67. Mr. Richardson submitted that Mr. Reynolds' assertion that it was not reasonable or practicable for the Home Office to distinguish between what is and is not sensitive information on behalf of the applicant for a licence, is at odds with the spirit and function of FOIA.

68. He submitted that it appears to be recognised by the Second Respondent that not all information provided to the Second Respondent would be confidential, but that distinguishing it is not considered 'reasonable' or 'practicable'. Mr. Richardson submitted that this was not the appropriate test, and that it was manifestly excessive for the Home Office to achieve the aim of protecting intellectual property and the safety of staff by simply considering everything as confidential.

69. Mr. Richardson submitted that there was an unsustainable logical leap between the requirement on licence holders to make certain disclosures that must be published as a matter of law, and the Home Office's assertion that all other information provided is therefore confidential.

70. Mr. Richardson submitted that this was at odds with past practice where project licences have been disclosed. He submitted that it contradicts the arrangements between the Home Office and applicants. The privacy notice provides that 'Deidentified data may also be used to answer Parliamentary Questions and Freedom of Information Requests' which gives rise to a reasonable expectation of just that.

71. Mr. Richardson submitted in summary that it was admitted by Mr. Reynolds that:

71.1. The application of confidence is on a case-by-case basis.
71.2. Data provided may be used to answer Freedom of Information requests.
71.3. It is not reasonable for the Home Office to distinguish between classes of information.

72. It was submitted that Mr. Reynolds' statement that information such as 'the number of licences that authorise a certain scientific test' might be released through FOIA is simply one example of information that may be disclosable.

73. Mr Richardson submitted that there is nothing within ASPA or FOIA which supports the assertion that an obligation to make certain information public means that all other information held is automatically considered confidential. It was argued that this was legally and factually unsustainable.

74. Mr. Richardson drew the tribunal's attention to the recent First-tier Tribunal decision in EA/2023/0091, [2024] UKFTT 00863 in which he stated the Home Office similarly raised section 44(1)(a) via section 24 asserting that the identity of a licenced establishment was confidential.

75. The First-tier Tribunal rejected that argument stating:

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

76. Mr. Richardson argued that it must be correct that not all information can reasonably be considered as having been provided in confidence, given the concession that information provided may be subject to FOIA. He quoted the following from the decision:

> "75. In our view, that second limb of s24 (information which has been given in confidence) more readily encompasses information such as project content or the name of a licensed individual. Either of those things would, as we understand it, be information which may well be given in an expectation of confidence, most likely as part of the process of applying for a relevant licence, but **subject always to an appreciation that the Home Office is itself susceptible to FOIA requests.**

> 76.By way of elaboration, the Home Office submits that the grant of an establishment licence is part and parcel of the application process. That does not address our difficulty. We accept that the act of the grant of the licence may be regarded as part of the process (based on information given in confidence), but the resultant licensed status is not, itself, part of the process. It is its product."

77. Mr. Richardson submitted that this reasoning also applies in the present case. He argued that certain information within the licences is not confidential, such as the identity of the licence holders, even if other details of the project are understandably confidential for commercial reasons.

78. Mr Richardson argued that the Home Office appear to assert that everything taking place under the auspices of ASPA between a licence holder and the Home Office is confidential. He submitted that section 24 only makes provision for information provided in confidence, not all information processed, generated or returned by the Home Office.

79. Mr. Richardson submitted that in the previous First-tier Tribunal case Mr. Reynolds was unable to refer to any codified or contracted reasons for the expectation of confidence:

> "77. Mr. Reynolds' evidence was that licensed establishments have an expectation that their information will be kept safe and secure by the Home Office, and that their names and addresses will not be published by the Home Office. When asked by the Tribunal to identify the basis for such an expectation, he pointed only to there being a public interest against disclosure and accepted that there was nothing agreed in writing between a licensed establishment and the Home Office which articulated such an expectation or effected an agreement as to confidentiality.

80. He argued that the same position applies here, but here Mr Reynolds has admitted in his evidence that licence holders are on notice that information provided may be disidentified and used for the purposes of FOIA requests.

81. Mr Richardson submitted that this undermines the nebulous assertion that all information exchanged between the Home Office and a licence holder has an expectation of confidence. He argued that certain basic and fundamental information such as date, names and types of animals should be disclosed even if other information within licences is withheld as confidential.

82. He drew the tribunal's attention to the conclusions of the tribunal in EA/2023/0091

> "78. We have found, and were shown, nothing in ASPA or the guidance on its operation which provides that the identity of a licensed establishment as such is, itself, confidential, or suggests that the establishment might have that expectation. Indeed, it seems to us that for that fact to be confidential might well diminish rather than affirm the accountability of licensed establishments, and thus, ASPA's function. ASPA makes provision for, inter alia, (1) the Secretary of State to enforce compliance with ASPA, take remedial action to safeguard the welfare of protected animals, and suspend or revoke a licence, (2) for a justice of the peace to issue a warrant forcing entry to licensed premises, if they believe an offence is being committed under ASPA, and (3) for proceedings for offences under ASPA to be taken. It does not seem to us that in any of these contexts a licensed establishment would have any expectation of confidentiality as to the fact of its licensed status, and we see no reason why any expectation should be different as between contexts of default or breach and those of day-to-day operations."

83. Mr. Richardson submitted that if an unsubstantiated assertion is sufficient to classify all matters as confidential, this could be used to withhold every piece of information held and undermine FOIA.

84. Mr. Richardson submitted that, subject to necessary redactions, the decision notice should require disclosure of the project licences without redactions of information that cannot reasonably be considered confidential.

85. Mr. Richardson argued that the fact that the Home Office had released project licences where there had been 'exceptionally heightened public interest' and demonstrations was sufficient to 'quash' the reasonable belief that the information was given in confidence.

86. It was submitted that the fact that some licence holders, such as the University of Manchester, publish as much information as they can, undermines the Home Office's position.

87. Mr Richardson asserted that the decision of the Upper Tribunal in **University of Newcastle upon Tyne v Information Commissioner and BUAV** [2011] UKUT 185 resulted in the disclosure of project licences which gave a clear precedent for disclosures of this nature when measured against section 24. He cited paragraphs 28-31 of the University of Newcastle's representations to the House of Commons as part of the review of ASPA.

88. Mr. Richardson submitted that without a clear basis for a reasonable expectation of confidence in relation to all information, the Home Office is

bound to disclose it, subject to necessary redactions. The tribunal was urged to critically and carefully assess the Home Office's assertions.

89. Mr. Richardson submitted that whilst the public interest was not a necessary consideration for the legal test, it was essential to consider the overarching effect of FOIA for the public.

Oral submissions/skeleton argument from the Home Office

90. Mr. Knight submitted that within this policy space all sorts of information is held by the Home Office that does not fall within section 24. In this particular context, in relation to the project licence application process, the Home Office reasonably believes that all information provided as part of the application for project licences is provided in confidence, save for the non-technical summary which is expressly provided by the statutory scheme to be done for the purpose of publication. He submitted that the line to be drawn is derived from the statutory scheme.

91. Mr. Knight set out the following five propositions in relation to the application of section 24.

92. Mr. Knight's first proposition was that the decision of the Court of Appeal in **BUAV** emphasises that the meaning and scope of section 24 is not to be interpreted by reference to the terms of FOIA, a piece of legislation that was enacted some 15 years later. He submitted that the only relevant purpose to be derived from FOIA in this context is that parliament has deliberately retained, through section 44, the existing legislative balance struck in other pieces of legislation about controls on disclosure. Beyond that, it was submitted that FOIA was not of direct assistance in answering the questions posed to the tribunal (see para 30 of the Court of Appeal's decision in **BUAV)**.

93. For that reason, it was submitted that arguments about the expectations that those dealing with public authorities have in relation to disclosure under FOIA do not have the same force as usual in the context of section 44. Section 44 was enacted with the express purpose of preserving the judgment already made in pre-existing legislation. Consequently, that pre-existing legislation is to be interpreted without reference to the subsequent transparency regime that was enacted.

94. In summary he submitted that section 24 should not be interpreted or read down either generally or in its application to particular facts by reference to the broader statutory purposes of FOIA.

95. The second proposition was that section 24 does not incorporate a public interest test.

96. The third proposition was that section 24 does not pose a question that incorporates the requirements of a common law breach of confidence or section 41 FOIA. Protection is not limited to commercially sensitive information (see para 32 of Carnwath LJ's judgment in **BUAV**). It poses a simpler question.

97. Mr. Knight submitted that section 24 is not intended to engage the tribunal in a detailed fact-finding exercise as to whether each and every strand of information included in the project licence generates, in the tribunal's view, a reasonable expectation of confidence. It is not necessary for the tribunal to undertake the exercise of assessing whether each piece of information in the closed bundle is confidential or not. That was the error fallen into by the tribunal in **BUAV**.

98. The fourth proposition is that section 24 is deliberately protective of officials because it is a penal provision. At paragraph 47 of Mr. Justice Eady's judgment in the High Court in **BUAV** he identifies a serious practical problem with the approach the tribunal took in that case:

> "47. A further difficulty, all the more acute because of the penal context, is that section 24 of ASPA would only provide the protection to which Parliament originally attached importance if the relevant civil servants were able to identify, straightforwardly, what information has been given in confidence and vice versa. Ms Steyn highlighted the irony that, applying its own *Coco v AN Clark (Engineers) Ltd* criteria, the tribunal was not able, at the conclusion of a two-day hearing, to arrive at a decision on this important issue. The matter was sent back for further consideration by Home Office civil servants (inevitably through the spectacles of hindsight). Moreover, it was recognised that this would involve a considerable burden of work. It is fair to record, however, that BUAV had suggested that this was the appropriate course to take, simply because the Home Office had greater familiarity with the subject matter and also had access to the views of relevant licence holders. Even so, it seems most unlikely that in 1986 Parliament would have intended such a painstaking exercise (and one that is so uncertain as to its outcome) to be carried out in testing the reasonable grounds for belief for the purpose of establishing criminal guilt."

99. This is why, Mr. Knight submitted, there is a critical and important justification for applying the straightforward and simple line that the Home Office has long applied, i.e. that everything in the licence application process is confidential apart from the non-technical summary which the legislative regime recognises as not confidential. That is a straightforward line for civil servants to apply without being unexpectedly and inappropriately sucked into criminal sanctions.

100. The fifth proposition is that the approach should reflect and recognise the original purpose of the legislative scheme, which is supported by the statement of the Minister in Hansard but evident from the language of section 24 in any event, i.e. that section 24 is there to provide a general protection of confidentiality to the application process in the hands of officials who have functions under ASOA.

101. Mr Knight pointed out that there is a critical distinction between disclosure by officials and disclosure by universities or other applicants where section 24 is not engaged. There the tribunal is in the different territory of section 41 and 38 which explains the approach of the Upper Tribunal in **University of Newcastle upon Tyne V IC and BUAV** [2011] UKUT 185 (AAC). It was submitted that there was no particular assistance to be gained from that decision.

102. Mr. Knight submitted that a number of things have changed since the Court of Appeal decision in **BUAV**. First, an amendment has been made to ASPA in 2012, taking effect in 2013 which creates a statutory encapsulation of the division between the non-technical summary and the rest of the information provided by the applicant. Mr. Knight sets out in his skeleton the derivation of those amendments from Directive 2010/63/EU.

103. Mr Knight submitted that it is important to recognise the language of section 5A ASPA as amended, which states that the non-technical summary must not contain any information of a confidential nature **or** any information the publication of which may lead to the infringement of any person's intellectual property rights. It was submitted that although intellectual property concerns are an important aspect of what the confidentiality provisions are there to protect, they are not the totality of it and there is legislative recognition of this in section 5A.

104. He argued that was an answer to the question put to Mr. Reynolds as to the justification for redacting words such as 'basic research' from the licences. It may not engage intellectual property concerns, but it falls squarely within the basic line in that it is information that is being provided by the applicant, the totality of which, save for the non-technical summary, is provided in confidence.

105. Mr. Knight acknowledged that Mr. Reynolds had properly and fairly accepted that the information given to applicants did not expressly put, in terms, that all the information provided, save for the non-technical summary, is treated as being provided in confidence. He pointed out that Mr. Reynolds had explained that to some extent this was because the regime was longstanding and well understood within the sector.

106. Whilst the Court of Appeal decision in **BUAV** refers to a 'softening' of the position, Mr. Knight submitted that the position has changed, at least from

2013 when the legislation was changed, and since then the unchallenged evidence from the Home Office is that the line as explained by Mr. Reynolds has been applied. It was submitted that this is now how the Home Office applies the line. It is effectively the custom and practice of the Home Office. That is how the industry understands it and it does not need to be spelt out in explicit terms.

107. Mr. Knight submitted that the question for the tribunal is not whether it has been 'put up in lights', but whether or not the person exercising the functions knows or has reasonable grounds for believing that the information has been given in confidence.

108. Mr. Knight argued that statutory scheme division provides more than sufficient by way of reasonable grounds. This is consistent with the privacy notice even though it is not expressly in those terms, and it is consistent with the footer on each page of the project licence. Mr. Knight submitted that the footer was accurate, and it did not say that the information provided might be disclosed.

109. Mr. Knight pointed out that the tribunal decision in EA/2023/0091, [2024] UKFTT 00863 related to a request for different information. That was a request for a list of establishments that had been licenced and the vast majority of the decision was about section 38. There was a brief discussion of section 44 and the tribunal held that section 44 would not apply to a free-standing request for a list of establishments, because effectively it was a request for a list of establishments qua licenced establishments, and that was a *product* of the confidential information process rather than information in the application process itself. In contrast the tribunal gave the view at paragraph 75 that the second limb of section 24 'more readily encompasses information such as project content or the name of a licensed individual'.

110. Mr. Knight submitted that this is a different point in a different context and, in any event, the requestor in this appeal does not seek information which identifies the establishment or the staff.

111. Mr. Knight argued that some of the other occasions on which the Home Office has released project licences are not properly exceptions. In some instances, Mr. Reynolds stated they have gone back and forth with the establishment and disclosure has been agreed. That is a different category of case.

112. Mr. Knight submitted that the disclosure in the MBR acres case was truly an exceptional case but consistent with section 24. Disclosure was authorised by the Minister on the basis that the public interest was so significant that it would be unlikely to be in the public interest to prosecute. Mr. Knight submitted that nothing wider could properly be drawn from that disclosure.

Findings of fact

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113. We found Mr Reynolds to be a straightforward witness who made concessions when appropriate. We accept that he gave honest evidence that was true to the best of his knowledge and belief. We make the following findings of fact on the balance of probabilities based on the evidence before us.

114. The Home Office holds a variety of information relating to the regulation of animal testing. Not all of it is information provided in the licence application. We accept that the Home Office considers each request for information on a case-by-case basis and applies the public interest test where applicable.

115. Where the request is for information provided to the Home Office as part of the application for a project licence, subject to the exceptional circumstances set out below, the Home Office applies section 24, because all the information provided in the application is considered by the Home Office to be provided in confidence with the exception of the non-technical summary.

116. We accept that this approach is now adopted consistently (subject to the exceptional circumstances set out below) and has been at least since the current regime requiring a non-technical summary was brought into force in 2013.

117. If an application for a project licence is granted, the completed application form itself becomes the project licence and therefore the Home Office applies this approach to requests for project licences.

118. In exceptional circumstances the Home Office has released information provided as part of an application for a project licence. In 2021 in relation to an establishment known as MBR Acres, the Home Office took the view that the public interest was 'exceptionally heightened'. Ministerial approval was sought to release inspection reports and a partially redacted copy of the project licence. The Home Office considered that this release was a breach of section 24, but took the view that be prosecution was unlikely to be seen to be in the public interest.

119. The Home Office has also released other partially redacted project licences with the agreement of the particular establishments on what information can be released.

120. When an applicant completes the on-line project licence application form, they are presented with a 'Privacy notice'. The Privacy notice states:

> **"Privacy notice**

ASPeL is provided by Home Office Digital, Data and Technology on behalf of the ASRU (Animals in Science Regulation Unit).

The data controller for ASPeL is ASRU. A data controller determines how and why personal data is processed.

What data we need

The personal data we collect from you includes:

• name, title, date of birth and email address
• place, or places, of work and your role within those establishments
• training, qualifications and experience relevant to the regulated use of animals in science
• your Internet Protocol (IP) address, and details of which version of web browser you used and operating system
• information on how you use the site, using cookies and page tagging techniques
• actions you make within the system recorded in an audit trail

We also collect:

• information about licensed establishments (and establishments applying for a licence), such as details of where scientific procedures can be carried out and names of people with specific responsibilities
• information relevant to licensed projects (and project applications), such as potential harms and benefits of the work, procedures, scientific background

What we do with your data and who sees it

The data provided by you and your establishment(s) is used by ASRU, the Animals in Science Committee and trusted, security vetted, government suppliers to assess the suitability of licence applications. It is also used to process metrics that are used to help improve the service that ASRU provides.

Information provided in the non-technical summaries of project licences, and in the annual statistics, will be de-identified before being published on GOV.UK.

De-identified data may also be used to answer Parliamentary Questions and Freedom of Information requests.

We will only ever share any identifiable data if we are required to do so by law – for example, by court order, or to prevent fraud or other crime."

121. Mr Reynolds accepted, in response to a question from the Judge, that the privacy notice was primarily focussed on personal data.

122. Applicants for project licences are not provided with any explicit or express statement that the information provided in an application form will be treated as provided in confidence. The Home Office's approach to section 24 is, however, regularly discussed at, for example, the licence holders' forum where the Home Office continues to explain how they handle information, and Mr Reynolds' view is that it is well understood within the industry.

123. Mr Reynolds stated that the Home Office was 'very clear' with establishments how they handle their data, through, for example, conversations with inspectors through the application process.

124. We accept Mr Reynolds' evidence that there is a very high bar for entry and that prospective applicants will already understand the system very well. We accept that many of them have 'lived through' the implementation of the Directive. We accept Mr Reynolds' evidence that it is implicit in the system and that from the point of view of applicants it is well understood that information provided in the application, other than the non-technical summary, is provided in confidence.

Discussion and conclusions

Section 21 - information in the public domain

125. It is clear from the wording of the request that no request is made for the non-technical summaries. The Home Office did not therefore need to rely on section 21 to withhold those documents.

Section 38

126. Section 38 was only applied to the project licence numbers. The appellant has confirmed that she does not wish to be provided with the project licence numbers and therefore it is not necessary to consider section 38.

Section 44

Preliminary observations

127. We are not assisted by the decisions of the Upper Tribunal **University of Newcastle upon Tyne v Information Commissioner** [2011] UKUT 185 (AAC) (**Newcastle**) or by the recent First-tier Tribunal decision in EA/2023/0091.

128. In **Newcastle** the Upper Tribunal held that section 44 did not apply because a section 24 offence could not have been committed by the University for a number of reasons, including that fact that it had no ASPA functions. That decision does not assist us in determining this appeal.

129. We are not required to distinguish EA/2023/0091, because we are not bound by it, but we note that the tribunal in that case made a distinction between information that may be given in an expectation of confidence as part of the process of applying for a licence and the resultant 'licenced status' which is the product rather than part of that process and therefore not within section 24.

Discussion and conclusions on section 44

130. It is not understood to be in dispute that the information was obtained in the exercise of the relevant functions, but for the avoidance of doubt we find that it was. If an application for a project licence is granted, the completed application form itself becomes the project licence.

131. Some of the arguments made on behalf of the appellant in this appeal amount to an attempt to reopen the issues that were decided by the Court of Appeal in **BUAV**.

132. It is clear from the Court of Appeal decision in **BUAV** that section 24 ASPA is to be construed in the context of ASPA and not "through the spectacles" of FOIA (**BUAV** [30]). The government made a positive decision to retain section 24 ASPA alongside FOIA. We accept Mr Knight's submissions that the fact that applicants know that the Home Office is subject to FOIA does not carry the weight under section 44 that it does in relation to other exemptions.

133. The fact that section 24 remains under review does not affect the merits of the arguments in this case.

134. Section 24 poses a question of fact: whether the official or other person in possession of the information knew or had reasonable grounds for believing that, at the time when he had given it, the giver of the information had intended to do so in confidence, and that intention is to be deduced either from the giver's express words or by reasonable inference from the circumstances.

135. It is not appropriate for us to import a separate test from the law of confidentiality, nor to limit the scope of the protection provided to licence applicants by reference to any more general interest in public information such as has been given effect by FOIA.

136. It is not necessary for the tribunal to consider the nature of each piece of information in the closed bundle to assess whether or not it has the quality of

confidence or is deserving of protection, either in our view, or in the reasonable belief of the relevant official. Neither the tribunal nor the official has to decide whether information given in confidence is none the less not entitled to protection. It is not necessary that disclosure would lead to an actionable breach of confidence.

137. This is clear from the Court of Appeal decision BUAV and avoids the serious practical problem identified by Mr. Justice Eady in paragraph 47 of the High Court decision.

138. When considering if the test is satisfied, the following facts found by the Court of Appeal in **BUAV** are relevant:

> **"Home Office policy under ASPA**
>
> 9. Until October 1998, licence application forms contained an assurance that all information given by applicants would be treated by the Home Office in confidence. In 1998, the National Anti-Vivisection Society (NAVS) obtained permission to apply for judicial review against the Secretary of State. The case was not contested. We do not have details of either the grounds of the application or the disposal of the case.
>
> 10. What we do know is that in October 1998, the Secretary of State issued a circular altering the previous practice, in the following terms:
>
> > "Confidentiality of applications
> >
> > "The guidance notes for completing licence and certificate application forms currently contain a commitment that applications will be treated in confidence at all stages. We have been notified that leave for a judicial review has been sought on the basis that this goes beyond the provisions of section 24 of the 1986 Act. It is also unlikely that such commitments can continue to be given in view of the proposed freedom of information legislation. We have therefore decided to delete these clauses from the guidance notes with immediate effect. We will, however, continue to abide by the terms of section 24 of the Act (unless and until it is repealed) i.e. we will not disclose information given, or believed to have been given, in confidence."
>
> 11. On 14 December 2004, in a letter explaining the effects of FOIA, the Home Office commented on the relationship of sections 41 and 44. It was assumed that information provided before October 1998 under the assurance of confidentiality would be exempt under section 41. With regard to licensing information provided after October 1998, the letter stated:

> "The blanket confidentiality assurance was withdrawn in October 1998 and since then we have accepted that decision on requests for disclosure of project licence information received after that date must be considered on a case by case basis. "

The letter gave no indication of the criteria by which this "case by case" review was to be conducted. The letter also referred to the intention to publish "abstracts" of newly licensed projects as part of the publication scheme.

12. In January 2005, the Home Office introduced a revised project licence application form. The guidance notes contained a section headed "Disclosure under the Freedom of Information Act 2000":

> "Information in this application which is not exempt from disclosure has to be provided to inquirers on request, but applicants should be aware that several exemptions may apply. In particular, there are exemptions for information whose disclosure could lead to an action for breach or confidence or is prohibited under section 24 of the Animals (Scientific Procedures) Act 1986, or where disclosure would prejudice commercial interests, or would compromise health or safety of individuals. Information that is already available or intended for publication within a reasonable time is exempt, and this would include information in the project abstract. Much of the information provided in a project licence application but not in the abstract is likely to fall within the exemptions."

The revised application form contained an abstract section. It was said that the abstract would be "separated from the application and published on the Home Office website" and would "not form any part of the licensed programme of work".

139. It is the Home Office's case based on the evidence on Mr Reynolds and the change in the law, that things have moved on significantly since the Court of Appeal decision in **BUAV.** We accept that they have.

140. ASPA was amended in 2012 and the statute now encapsulates the division between the non-technical summary and the rest of the information provided by the applicant for a project licence. Applicants are expressly informed that the non-technical summary will be published and that it must not contain any information of a confidential nature, or which would infringe intellectual property rights or identify personal information. This distinction reflects and enacts the distinction made in the underlying Directive 2010/63/EU.

141. We have found as a fact that this statutory distinction is reflected in the practice of the Home Office. The Home Office does not, as was the case at the time of the Court of Appeal decision in **BUAV,** issue any explicit guidance notes on the application of FOIA, nor does it take the view or communicate to applicants the view that 'much' of the information provided in a project licence application but not in the non-technical summary is 'likely' to fall within the exemptions.

142. We accept on the basis of Mr Reynolds' evidence that the Home Office now applies a much harder or brighter line, because of the difficulty for the Home Office in distinguishing what is and what is not sensitive information on behalf of the applicant. Instead it adopts the simpler position that everything the applicant provides in the application form is considered to be provided in confidence, with the exception of the non-technical summary.

143. We accept Mr Knight's argument that the 'exceptions' highlighted by Mr Richardson do not undermine this position. Where agreements are made with individual establishments to release certain information, this may still technically be in breach of section 24 but is unlikely to lead to prosecution. In relation to MBR Acres the Home Office released the information in the knowledge that this was in breach of section 24, but with the expectation that a prosecution would be unlikely to be seen to be in the public interest. That was why a ministerial decision was required.

144. In summary, there is clear evidence from Mr Reynolds on the position now adopted by the Home Office. What is less clear is the manner in which that position is communicated to applicants.

145. That is important because the question for us to answer is whether the relevant official knew or reasonably believed that the information was 'given in confidence'. As the Court of Appeal noted, this directs attention to the intentions of the giver of the information at that time, either as expressed or as reasonably to be inferred from the circumstances.

146. The lack of clear evidence on the expectations of applicants is surprising, given that the Court of Appeal clearly highlighted this difficulty in 2009:

> "34 Another source of difficulty has been the lack of any direct evidence or information about the viewpoint of licence-holders or applicants. Again, there may have been practical reasons for this, but it left a potentially awkward gap in the Home Office case. Until 1998 applicants were able to rely on a blanket assurance of confidentiality. When that was withdrawn, they were given no specific assurance as to how any particular category of information would be treated. Thereafter, one might have expected any applicant who was particularly concerned about confidentiality to have sought at least some clarification of the

> department's likely approach to information supplied by him. If there have been such exchanges, we know nothing about them. In the event the commissioner felt able to infer from the limited material available that applicants would have had an "expectation of confidentiality" for information supplied by them. As we have said, that factual conclusion is not subject to challenge in this court."

147. We observe, as Lord Justice Carnwath did at [33], that it is not immediately obvious why, as a matter of law, the Home Office was precluded by ASPA from giving a general assurance of confidentiality. Given that the Home Office's practices have moved on, it is not clear to the tribunal why there is no express statement to applicants to the effect that all information provided in the application, save for that included in the non-technical summary, is treated as having been provided in confidence.

148. The Privacy Notice does go some way towards providing an express indication to applicants, but it is heavily focussed on personal data. We do accept that the section on personal data is followed by a section on information that the Home Office 'also' collects and that this section is not limited to personal data. The section headed 'What we do with your data and who sees it' is, we accept, not inconsistent with the Home Office's approach but, again, it is focussed heavily on 'identifiable' data and does not clearly explain that all information in the application form is considered to have been provided in confidence.

149. The handling instructions in the footer of each page on the application form are also not, in our view, inconsistent with the Home Office approach, but again the footer does not clearly explain that all information in the application form is considered to have been provided in confidence.

150. When the Judge asked Mr Reynolds why the Home Office did not make such an express statement, he replied 'hindsight is a wonderful thing, and I wish we did actually right now…I think it would be a good way forward for us… we believed that we were running a system that was well understood'.

151. As Mr Knight fairly reminded the tribunal in his closing submissions, the question for us to answer is not whether it has been 'put up in lights', but whether or not the person exercising the relevant functions knows or has reasonable grounds for believing that the information has been given in confidence.

152. Taking into account our findings of fact, we accept that Mr Reynolds believes that all the information provided in the applications for project licences is provided by the applicants with an expectation of confidentiality.

153. Is that belief based on reasonable grounds? His evidence showed that his belief is based on the fact that, in his experience, the Home Office's approach is well

understood by applicants and that applicants are familiar with the statutory distinction between the information contained in the non-technical summary which is to be published and the rest of the information in the application which, by implication, is not.

154. In our view, taking all this into account it can reasonably be inferred from the circumstances that applicants for project licences intended, at the time they submitted the application, for any information not included in the non-technical summary to be provided in confidence. We accept that it can reasonably be inferred from the circumstances that the applicants gave that information with an expectation of confidence. For those reasons we accept that the belief was on reasonable grounds.

155. Accordingly, we decide that disclosure is prohibited by an enactment, namely section 24 ASPA, and the requested information is exempt information under section 44 FOIA.

Observations

156. The tribunal is aware that section 24 ASPA remains under review, but it is a matter for parliament, not the judiciary, to decide if a change should be made. Further, we acknowledge the appellant's concerns about the adequacy of the NTS and the consequent effect on transparency, but that is a matter outside the remit of this tribunal.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 23 October 2024