

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 October 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to project licences for animal testing. The Home Office provided some of the requested information, with redactions applied, citing sections 21 (information accessible to applicant by other means), 44(1)(a) (prohibitions on disclosure) and 38(1)(health and safety) of FOIA to withhold the remaining information.
2. The Commissioner considered the Home Office's application of sections 44(1) and 38(1).
3. The Commissioner's decision is that the Home Office is entitled to rely on sections 44(1) and 38(1) of FOIA to withhold the information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 26 February 2023, the complainant wrote to the Home Office and requested information in the following terms:

"Please may I have redacted project licences for the following:

Volume 2 of Non Technical Summaries for 2019 [which can be found at link provided]:

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 provided]:

Project 200 Pages 1459 – 1466 Toxicology of Pharmaceuticals (4000 beagles) – 5 Years’.

6. The Home Office responded on 12 April 2023. It withheld the requested non-technical summary, as it is publicly available. Accordingly it cited section 21 (information accessible to applicant by other means) of FOIA.
7. It provided two project licences, with redactions applied under sections 44(1)(a) (prohibitions on disclosure) and 38(1)(a) and (b) (health and safety) of FOIA.
8. Following an internal review, the Home Office maintained its position, clarifying that section 44 applies to the requested project licences and that the requested licence numbers are withheld under section 38(1)(a) and (b).

Scope of the case

9. The complainant disputes the application of sections 44 and 38, expressing dissatisfaction that “every word that is not standard to a project licence has been deleted”.
10. During the course of the Commissioner’s investigation, the Home Office confirmed its application of section 44(1)(a) to the bulk of the withheld information, with section 38(1)(a) and (b) applying to the remaining small amount of withheld information.
11. It considers that section 44(1)(a) of FOIA applies by virtue of section 24 of the Animals (Scientific Procedures) Act (ASPA) 1986.¹
12. The Commissioner acknowledges that both parties drew his attention to a public consultation on section 24 of ASPA that took place in 2014. The Commissioner understands that while the consultation has concluded, no outcome has been published.

¹ [Animals \(Scientific Procedures\) Act 1986 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/1986/12)

13. It is not within his remit to comment on the consultation or the publication of the outcome of the consultation.
14. In their correspondence with the Home Office and with the ICO, the complainant explains their reasons for disputing the application of sections 38 and 44. However, there is no reference to the Home Office's application of section 21 to withhold information within the scope of the request that is accessible to the applicant by other means.
15. In light of the above, the Commissioner considers the scope of his investigation is to determine whether the Home Office was entitled to apply sections 44 and 38 to the information withheld by virtue of those exemptions.

Reasons for decision

Section 44 prohibitions on disclosure

16. Section 44(1) of FOIA states:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment,

(b) is incompatible with any retained EU obligation, or

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

17. The Commissioner considers that the “otherwise than under this Act” provision means that any obligation to disclose under FOIA itself must be disregarded.
18. In other words, although FOIA creates a duty for public authorities to provide information on request, there are prohibitions on disclosure created by other legislation, retained EU obligations and contempt of court.

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

19. Information is exempt under section 44(1)(a) of FOIA if its disclosure would breach any of the following:
 - primary legislation (an Act of Parliament); or
 - secondary legislation (a Statutory Instrument).

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

21. Section 24(1) of ASPA states:

“A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence”.

22. Explaining why it considers that the project licences are governed by section 24 of ASPA, the Home Office told the complainant:

“The licences contain information provided by the applicant in confidence during the application process. This information has been redacted under Section 44(1)(a) of the FOIA, information whereby disclosure is prohibited by an enactment. The release of this information is prohibited under Section 24 of the Animals (Scientific Procedures) Act 1986”.

23. In its submission, the Home Office told the Commissioner:

“We consider that section 24 applies to all Home Office staff carrying out a function under ASPA...”.

24. With respect to its application of section 44 in this case, it further explained:

“The statutory prohibition set out in section 24 of ASPA applies to the functions of the Home Office in administering ASPA as a whole. The relevant sections of ASPA are sections 5 to 5G, regarding the granting of project licences. The project licence contains information provided by the applicant in confidence during the application process.”

25. Describing the nature of the information provided, it confirmed that this information is considered to have been given to the Home Office in confidence.

The Commissioner's view

26. To engage section 44(1)(a) of FOIA, the public authority needs to demonstrate that disclosure of the requested information is prohibited under another piece of legislation – in other words, there should be an enforceable legal prohibition acting as a statutory bar to disclosure under FOIA of that information.

27. In his guidance on section 44², the Commissioner states:

“If a statutory prohibition refers to the functions of a public authority and these are defined in the legislation, this definition must be followed. If the functions are not defined then we consider that functions constitute the powers and duties that have been specifically entrusted to that authority”.

28. The functions of the authority are not defined in ASPA. In accordance with his guidance, therefore, the Commissioner considers the functions constitute the powers and duties specifically entrusted to the Home Office.

29. As noted above, the Home Office considers that section 24 of ASPA applies to the functions of the Home Office in administering ASPA as a whole.

30. The Commissioner has considered section 5 of ASPA, as referenced by the Home Office.

31. Section 5(1) of ASPA states:

“A project licence is a licence granted by the Secretary of State which specifies a programme of work and authorises the application, as part of that programme, of specified regulated procedures to animals of specified descriptions at a specified place or specified places”.

32. Having considered the relevant legislation, the Commissioner is satisfied in this case 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.

33. In accordance with his published guidance, the Commissioner is also satisfied that the requested information was obtained by the Home Office in the exercise of those functions – namely, in connection with the exercise of its licencing function.

² <https://ico.org.uk/media/for-organisations/documents/2021/2619033/s44-prohibitions-on-disclosure.pdf>

34. The second part of the test is whether the Home Office knows, or has reasonable grounds for believing, the information to have been given in confidence.
35. The Home Office told the complainant:

“The project licences contain information which is considered to have been given in confidence by the applicant during the application process”.
36. In that respect, it told the Commissioner the project licence contains information provided by the applicant including information about the specifics of their scientific work.
37. The Commissioner has had the opportunity to consider the withheld information. He accepts that the withheld information includes information of the type described by the Home Office.
38. With reference to the wording of section 24 of ASPA, the Commissioner has next considered whether the Home Office knows, or has reasonable grounds for believing, that the information was given in confidence.
39. He is mindful of the nature of the information concerned and that the applicant is required to provide such information to the Home Office as part of the application process.
40. He accepts that, in the circumstances, it is reasonable to consider that it was provided by the applicant with an expectation of confidence.
41. In light of his findings that the Home Office has ASPA functions, that it obtained the information in the exercise of those functions and knows, or has reasonable grounds for believing, the information to have been given in confidence, the Home Office can commit an offence under section 24(1) of ASPA and so section 44(1)(a) of FOIA does apply.
42. As section 44 is an absolute exemption, there is no need to consider the public interest.
43. The Commissioner has next considered the Home Office’s application of section 38 to the remaining withheld information.

Section 38 health and safety

44. Section 38 of FOIA provides an exemption from disclosing information if it would endanger any individual.
45. In this case, the Home Office is citing section 38(1)(a) and (b) to withhold the licence numbers contained within the project licence documents.

46. In support of its application of section 38 in this case, the Home Office explained to the complainant:

“The licence numbers were withheld under section 38(1)(a) and (b). When releasing information under the FOIA, in providing a response to one person, the Home Office is expressing a willingness to provide the same response to anyone. As disclosure of licence numbers could lead to identification of an establishment, it would be likely to lead to establishments being targeted and there is a clear risk to the physical safety of staff who work there”.

47. In its submission to the Commissioner, the Home Office put forward similar arguments, explaining that releasing the requested project licence numbers could lead to an establishment being identified as one that carries out scientific procedures on animals, or breed/supply animals, for that purpose. It argued that this would be likely to present a potential risk to the physical and mental health and safety of individuals working at the establishment and their families.

48. The Commissioner’s guidance ‘Section 38 - Health and Safety’³ recognises that section 38(1)(a) focuses on endangerment to any individual’s physical or mental health while section 38(1)(b) focuses on endangerment to the safety of any individual.

49. The Commissioner considered the application of section 38 to withhold information relating to licensed establishments under ASPA in case reference IC-177442-Q4D0⁴.

50. Having considered all the factors applicable to this case, the Commissioner is satisfied that the similarity between this case and IC-177442-Q4D0 is such that he is able to reach the same decision on the application of section 38 without the need for further analysis.

51. The decision notice in case reference IC-177442-Q4D0 is attached for reference.

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023765/ic-177442-q4d0.pdf>

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Signed

Michael Lea
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