The way ahead

The decision of 20 February has by no means marked the end of this matter. Advocates, in conjunction with four other organisations,[25] has launched a renewed campaign calling for further legislative reform.

Freedom of information

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Introduction

Readers will recall the case brought by the BUAV against the Home Office and the Information Commissioner relating to its request for information, under section 1(1)(b) of the Freedom of Information Act 2000 ("the FOI Act").[26] The Court of Appeal has now dismissed the BUAV's appeal[27] against Mr Justice Eady's decision, who had in turn allowed the Home Office's appeal against the Information Tribunal's decision. The Tribunal had held that the Home Office applied the wrong legal test when refusing to disclose the vast majority of the requested information.

The case has followed a tortuous route. At each stage, the BUAV has been faced with a different approach by the decision-maker/judicial body in question. The Court of Appeal's decision is both extreme and troubling, as I will explain.

The BUAV's request, the Home Office's response and the statutory regime

In January 2005, soon after the main provisions of the FOI Act came into force, the BUAV requested anonymised information contained in five specified project licences issued under the Animals (Scientific Procedures) Act 1986 ("the 1986 Act"). Project licences set out in detail the objectives of the research, what is to be done to the animals and with what expected adverse effects, what ameliorative measures should be taken and why the use of animals is considered necessary. The information is designed to enable the Secretary of State for the Home Department to assess whether the various statutory tests for the grant of a licence are met.

The BUAV only knew about the licences because the Home Office had published abstracts (summaries) of them. There are two separate regimes under the FOL Act: first, one of compulsory disclosure (subject to various exemptions), under section 1(1)(b), by public authorities of information held by them, pursuant to a request by a member of the public; and, second, one of voluntary disclosure under the publication scheme each public authority must have under section 19. Since December 2004 the Home Office has encouraged licence applicants to submit abstracts with their applications. If they do so, the abstract is then published by the Home Office under its publication scheme. Abstracts are normally 2-3 pages long, whereas the licences themselves can exceed 40 pages. A licence is in identical form to a licence application in its final form.

What a public authority voluntarily publishes under its publication scheme cannot adversely affect what a requester is otherwise entitled to under the compulsory regime: *Corporate Officer of the House of Commons* v *The Information Commissioner and others.*[28]

The Home Office released some, very limited, information from the project licences in question but otherwise rejected the request. It relied on a number of exemptions, including those under sections 38(1) (health and safety), 41(1) (information provided in confidence), 43(2) (commercial interests) and, crucially for present purposes, section 44(1)(b) (prohibitions on disclosure under different legislation). In the present context section 44(1)(b) leads one to section 24(1) of the 1986 Act (see below). The Commissioner eventually decided that section 24(1) applied to all the withheld information and he therefore did not consider whether the other exemptions applied. Nor has any other judicial body.

It is important to understand that the Home Office had conceded, in a judicial review brought by the National Anti-Vivisection Society in 1998, that it could not assure licence applicants that all information given to it would be treated as confidential. It reiterated this in December 2004,

[25] Hessilhead Wildlife Rescue, International Otter Survival Fund, League Against Cruel Sports and Scottish Badgers.
[26] See Thomas, D., "Freedom of information", *Journal of Animal Welfare Law,* Summer/Autumn 2008, p. 13.
[27] [2008] EWCA Civ 870, see www.bailii.org/ew/cases/EWCA/Civ/2008/870.html.
[28] [2008] EWHC 1084 (Admin), see paragraph 33.

just before the main provisions of the FOI Act came into force. In the Court of Appeal, the Home Office argued that it, and not applicants, was the arbiter of which information was protected, albeit that an applicant's views would of course be relevant.

Section 24(1) of the 1986 Act

Section 24(1) provides:

> "A person is guilty of an offence if otherwise than for the purposes 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."

So, the issue was whether the Home Office knew or had reasonable grounds for believing that the withheld information had been given to it in confidence. None of the licence applicants in question said that they regarded the information as protected; the Home Office simply inferred that they expected it to be.

Under section 75 of the FOL Act, the Secretary of State for Justice has to review all statutory prohibitions on disclosure and decide whether to repeal or relax them. In 2004, it was decided to retain section 24(1) of the 1986 Act, at least for the time being.

The Tribunal's decisions and that of Mr Justice Eady

The Tribunal agreed with the BUAV that one cannot give information "in confidence" within section 24(1) unless the law recognises it as confidential,[29] and that statements by a House of Lords minister when the bill which became the 1986 Act was going through Parliament supported this conclusion.

Tellingly, the Tribunal, which (unlike the BUAV) saw both the abstracts and the licences to which they related, said this about the former:

> "[T]he abstracts appear generally to adopt a style and tone intended to persuade the reader as to the value of the proposed experiments. This is in contrast to the style of the licence applications, which are more neutral in tone. This perception of a positive spin having been applied to the published information was increased by the absence from the abstracts of the detail about the experiments themselves."[30]

This underlines why the BUAV was not content with just the abstracts.

Mr Justice Eady, drawing on post-Human Rights Act privacy cases and the test of misuse of information they posit,[31] said that section 24(1) could apply even if the information did not have the quality of confidence and was not a commercial secret – but did not explain when.

The Court of Appeal's decision

The Court of Appeal said, in terms, that the Home Office had been wrong to make the concession in the 1998 judicial review. It was entirely up to providers of information whether to "give [information] in confidence" and thereby to bring it within the protection of section 24(1). The law of confidentiality was not relevant. The Home Office's role was limited to discerning the intention of the provider, where this was not clear.

Commentary

The Court of Appeal's decision is more coherent than the Home Office's very muddled approach (and, rightly, it did not favour Mr Justice Eady's misuse of information test). But it remains highly disturbing. It means that animal researchers have complete control over what information is put into the public domain. They can prevent the trivial, the embarrassing, information about animal suffering, information of crucial importance to human health, even information about their own wrongdoing[32]

[29] *Coco* v *Clark* [1969] RPC 41 is generally regarded as the leading authority as to when the law will protect information as confidential in the non-contractual setting.

[30] *British Union for the Abolition of Vivisection* v *The Information Commissioner and the Home Office* (EA/2007/0059), 30 January 2008, paragraph 8.

[31] See, for example, *Campbell* v *MGN Ltd* [2004] 2 AC 457 (HL).

[32] Iniquity deprives confidential information of protection but the Court held that the law of confidence had no application. In its petition for leave to appeal to the House of Lords the BUAV gives another example of how unsatisfactory it is to give animal researchers complete control over information:

> "A contemporary example, currently before the [Information Commissioner], illustrates the general point. The [Home Office] approves overseas suppliers of primates to UK laboratories. It withdrew approval from a particular supplier in Vietnam, because of poor welfare conditions

reaching the public, and thereby prevent public and Parliamentary scrutiny in an acutely controversial area. Moreover, they can effectively prevent judicial scrutiny of the lawfulness of Home Office regulation, an issue which featured large in argument but which the Court ignored in its judgment.[33] In some ways, the published abstracts, with what the Tribunal saw as "spin", make things worse, because far from facilitating public debate they may distort it.

Moreover, the effect of the Court's decision is that criminal liability attaches to public officials who wrongly disclose information where civil liability would not (because the disclosed information is not confidential).[34] That is a surprising result.

The House of Lords has now refused the BUAV permission to appeal, without giving reasons. The focus will now turn to campaigning for repeal of section 24, which can be done by ministerial order under section 75 of the FOI Act. In the meantime, other public authorities involved in animal experiments – such as universities – cannot generally rely on section 24 (because they generate the relevant information, rather than it be given to them as with the Home Office) and a number of FOI Act challenges to their decisions refusing information remain in the pipeline. It is astonishing, but perhaps revealing, the lengths to which animal researchers will go to prevent access to information. The BUAV's experience is that they and public authorities "talk the talk" about transparency, but that the reality is very different.

As in the High Court, the Home Office did not seek costs from the BUAV, and has thereby accepted that the case raises important points of principle. Indeed, the Court of Appeal expressed discomfort – albeit not as forcefully as had Mr Justice Eady[35] – about the inconsistency between the secrecy which is the result of its interpretation of section 24 and the presumption of transparency underpinning the FOI Act.

MEDIA WATCH

"**A dog's breakfast**", Law Society Gazette, Vol. 105, No 16, 2008, p. 30

Robert Wade examines the Dangerous Dogs Act 1991 and considers potential areas of reform.

"**How irrational does irrational have to be?: *Wednesbury* in public interest, non-human rights cases**", Judicial Review, Vol. 13, Issue 4, 2008, p. 258

David Thomas discusses the British Union for the Abolition of Vivisection's recent judicial review against the Home Office.

The *Financial Times*, 6 November 2008, p. 11, reported on European Union plans to strengthen the protection of animals in research by banning experiments with great apes, extending the ethical evaluations required before experiments with animals were authorised and setting minimum requirements for housing and care of animals subjected to testing.

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discovered there by its inspectors. Shortly thereafter it reinstated approval following evidence supplied by a third party. There are strong indications that the third party was a leading UK laboratory, with an interest in maintaining its supply of primates. On the Court of Appeal's construction, the information supplied by the third party would, at its behest, be hidden from Parliament, the public and the courts. No-one would be able to make an assessment about the appropriateness of the [Home Office's] decision to reinstate approval so quickly. The third party has indeed purported to give the information in confidence, even though it has no proprietorial interest in it (the information relates to conditions at an establishment it does not own or control)."

[33] Indeed, Dr Jon Richmond, head of the relevant department at the Home Office, had candidly acknowledged in evidence before the tribunal that judicial scrutiny would be impossible, even on the Home Office's slightly less restrictive approach to section 24(1).

[34] See *R* v *Johnstone*, 2003 FSR 42 where Lord Nicholls said, in relation to the criminal provisions of the Trade Marks Act 1994: "Parliament cannot have intended to criminalise conduct which could lawfully be done without the proprietor's consent. Parliament cannot have intended to make it an offence to use a sign in a way which is innocuous because it does not infringe the proprietor's rights. That would be to extend, by means of a criminal sanction, the scope of the rights of the proprietor." (paragraph 28)

[35] "There are no doubt many who would agree with BUAV's case that 'as much as possible of the information needs to be publicly available in order to facilitate public, Parliamentary, and ultimately judicial, scrutiny of performance by the Secretary of State of her statutory duties.' " The judge also said that "[i]t would appear sensible, so that all those concerned know where they stand, to adopt as the starting point the presumption that the content of applications should be generally available but to allow for confidential schedules to be attached." (paragraph 61)