IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0064**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50215164

Dated: 3 March 2010

Appellant: BRITISH UNION FOR THE ABOLITION OF VIVISECTION

Respondents: (1) INFORMATION COMMISSIONER

(2) NEWCASTLE UNIVERSITY

Heard at Audit House, London EC4

Date of hearing: 5, 6 September 2011

Date of decision: 11 November 2011

Before

Andrew Bartlett QC (Judge)
Malcolm Clarke
Jacqueline Blake

Attendances:

For the Appellant: Adam Sandell

For the Second Respondent: Timothy Pitt-Payne QC

The First Respondent was not represented and did not appear.

Subject matter:
Freedom of Information Act s38(1) – whether disclosure would, or would be likely to, endanger health or safety – public interest balance
Freedom of Information Act s43(2) – whether disclosure would, or would be likely to, prejudice commercial interests – public interest balance
Tribunal procedure – whether disputed information to be made available to appellant's counsel in confidence – whether appellant's counsel to be permitted to participate in closed session - Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 - Data Protection Act 1998 ss58-59

Cases:
Hogan and Oxford City Council v Information Commissioner EA/2005/0026, 17 October 2006

Guardian Newspapers Ltd v Information Commissioner EA/2006/0011, 8 January 2007

Home Secretary v BUAV [2008] EWHC 892 (QB)

All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence [2011] UKUT 153 (AAC)

Sittampalam v Information Commissioner and BBC EA/2010/0141, 4 July 2011

Cases referred to in Appendices 1 and 2:

Science Research Council v Nassé [1980] AC 1028

Secretary of State for the Home Department v Rehman [2000] EWCA Civ 168

Secretary of State for the Home Department v Rehman [2001] UKHL 47, [2003] 1 AC 153,

R v H [2004] UKHL 3, [2004] 2 AC 134

Roberts v Parole Board [2005] UKHL 45, [2005] 2 AC 738

Somerville v Scottish Ministers (Scotland) [2007] UKHL 44, [2007] 1 WLR 2734

Campaign against the Arms Trade v IC and Ministry of Defence EA/2006/0040 (26 August 2008)

Gilby v IC and Foreign and Commonwealth Office EA/2007/0071, 007 and 0079 (22 October 2008)

RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10; [2010] 2 AC 110

Al Rawi v Security Service [2011] UKSC 34

Tariq v Home Office [2011] UKSC 35

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 3 March 2010.

SUBSTITUTED DECISION NOTICE

Public authority: **NEWCASTLE UNIVERSITY**
Address of Public authority: **6 Kensington Terrance**
Newcastle upon Tyne NE1 7RU

Name of Complainant: **British Union for the Abolition of Vivisection**

The Substituted Decision
For the reasons set out in the Tribunal's determination of 10 November 2010 (as upheld by the Upper Tribunal on 11 May 2011, [2011] UKUT 185 (AAC)), and for the reasons set out with this present decision, the substituted decision is that the public authority did not deal with the complainant's request in accordance with the requirements of Part I of the Freedom of Information Act 2000 in that the public authority ought to have disclosed to the complainant the information in the two requested licences, subject to the following exceptions:

(1) By reason of FOIA s38(1) the authority is not required to disclose from licence PPL 60/3362 the passage of 5-6 lines coded as AC on page 269 of the closed bundle.
(2) By reason of FOIA s43(2) the authority is not required to disclose from the two licences, the subject of the request, the information concerning unimplemented research ideas as marked up in exhibit AT4 in the closed bundle.

Action Required
The public authority shall disclose the information in the two requested licences, subject to the exceptions mentioned above, within 28 days after publication of this decision, or upon the final disposal of the pending proceedings in the Court of Appeal concerning the decision of the Upper Tribunal [2011] UKUT 185 (AAC), whichever shall be the later.

REASONS FOR DECISION

Introduction

1. The appellant, BUAV, has sought to obtain from Newcastle University certain information about experiments on non-human primates.

2. The right of any person to obtain information from a public authority under the Freedom of Information Act ("FOIA") applies only to information which the public authority holds. At an earlier stage in these proceedings this Tribunal decided that the University held the relevant information, and was not prohibited from disclosing it by the statute which governs experiments on animals, the Animals (Scientific Procedures) Act 1986 ("ASPA"). An appeal to the Upper Tribunal was dismissed. An appeal to the Court of Appeal is currently pending.

3. This decision is concerned with whether the University should disclose the requested information under FOIA, or whether such disclosure is not appropriate having regard to the exemptions in FOIA s38(1) (danger to health or safety) and s43(2) (prejudice to commercial interests).

4. The general approach of ASPA (which implements the European Directive 86/609/EEC) is that experimentation is only permitted when there is no alternative research technique available and the expected benefits are judged to outweigh the likely adverse effects on the animals concerned, and subject to minimising the number of animals used and their suffering. There is a strong difference of opinion between those who believe that lawful scientific experimentation on animals is justified and desirable, and those who believe that it is morally wrong. Our function is not to adjudicate on that dispute but to apply the applicable law to the issues in this appeal.

5. BUAV made an application for an order allowing its counsel to see all the information within the scope of the request and to participate fully in the closed session at the final hearing, on terms that counsel should not without the consent of the Tribunal disclose any of the information thereby obtained, including to BUAV or its solicitor. This application was refused on 1 July 2011, for reasons published on 13 July 2011. At BUAV's request this ruling was subsequently reconsidered, following a change in the relevant circumstances. The application was again refused, and the parties were so notified on 2 September 2011. The reasons for the second refusal are attached as Appendix 1 to the present decision. (To render them intelligible the original ruling is attached as Appendix 2.) At the Tribunal's direction BUAV was supplied with a list of the items of closed material before the Tribunal (ie, the material which BUAV could not be permitted to see in advance of a decision on disclosure under FOIA), with a brief informative description of each item, formulated in such a way as not to reveal the

substance of the disputed information or any other information arguably protected from disclosure under FOIA.

The request and its scope

6. On 9 June 2008 BUAV submitted a request to Newcastle University for the information set out in the project licences, issued under ASPA, which governed the primate research at the University discussed in three published articles. The titles and citation details of the articles (which had been published in 2006-2007) were set out. The request concluded with the words-

> Names (other than those of the authors) can be withheld, as can addresses. In addition, the BUAV accepts that information of a genuinely confidential nature can be withheld. Otherwise, however, the information disclosed should be as it is contained in the project licences in question.

7. In reply on 30 June 2008 the University confirmed that it held the relevant project licences, but set out reasons why it considered that they were not disclosable. The University's letter included a detailed analysis of the application of sections 38 and 43, and of the public interest balance. BUAV challenged the University's decision and requested internal review. After review the University substantially confirmed its earlier views by letter of 28 July 2008.

8. This letter made reference to a telephone call made by the University to Dr Taylor of BUAV on 15 June 2008. BUAV did not agree with what was said about it. BUAV in its letter of 6 August 2008 clarified that the reference at the end of BUAV's request to confidential information was an acknowledgment that certain exemptions might apply to some of the information but that, subject to that qualification, BUAV wanted the information as contained in the licences in question. It also identified certain parts of the licences in which it was particularly interested.

9. BUAV complained to the Commissioner. An exchange with BUAV during the Commissioner's investigation, concerning the parts of the licences it was particularly interested in, led subsequently to a contention by the University that BUAV's request had been limited to those particular parts. The Tribunal ruled on 1 July 2011 (for reasons issued on 13 July 2011) that for the purposes of the present appeal the disputed information consisted of the whole of BUAV's original request made on 9 June 2008.

10. On this appeal the University argued that the request was limited to the information discussed in the published articles. This contention was first raised in the University's letter to the Commissioner dated 10 February 2010. The argument was essentially that the word "discussed" in the

request should be read as qualifying the word “information”; in other words, the purpose of the reference to the articles was to limit the scope of the request to the information discussed in the articles. BUAV argued that the word “discussed” qualified the word “research”; in other words the purpose of the reference to the three published articles was to enable the University to understand which project licences were the subject of the information request. In our view BUAV’s argument is plainly correct, and represents how the reasonable reader would have understood the request (and indeed how it was originally read by the University). The request was for the contents of the licences. The scope of the request included information which was contained in the project licences, even where that part of the information was not discussed in the three articles.

The exemptions

11. The first exemption relied on by the University is that contained in section 38 of FOIA, which relates to health and safety. Section 38(1) provides-

> (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.

12. The second exemption relates to the protection of commercial interests. Section 43(2) provides-

> (2) 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).

13. Both sections are qualified exemptions. By FOIA s2(2)(b) they are subject to the public interest test, by which the requester’s right to have the information communicated to him does not apply if or to the extent that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

14. Because the Commissioner decided against the requester on other grounds he did not reach any conclusion upon the application of the two exemptions or of the public interest test. At the further hearing before us in September 2011 the Commissioner took no part.

15. Both exemptions use the phrase “would, or would be likely to”. We take this in the sense discussed in *Guardian Newspapers Ltd v Information Commissioner* EA/2006/0011, 8 January 2007, at [53]. It refers to probable

occurrence (more likely than not) or to a very significant and weighty chance of occurrence – something more than merely "a real risk".

16. The section 43 exemption uses the word "prejudice". It was common ground between the parties that this was a reference to disclosure causing prejudice which was real, actual or of substance: *Hogan and Oxford City Council v Information Commissioner* EA/2005/0026, 17 October 2006, at [30].

17. As regards the endangerment of health or safety, Mr Pitt-Payne submitted that the word 'endanger' was a word which referred to risks, so that the s38 exemption would be engaged if we considered that there was a weighty chance of a risk to health or safety. There is a basis for this view in the literal words of the section. Mr Sandell submitted, however, that "endanger" in section 38(1) was equivalent to "prejudice" in section 43, so that mere risks were not sufficient.

18. We do not fully accept either submission. We must take into account that in s38(1) Parliament chose to use the word "endanger" and did not refer either to "injury" or to "prejudice". On the other hand, considering the statutory purpose of freedom of information, balanced by exemptions, we are not persuaded that it would be right to read the word "endanger" in a sense which would engage the exception merely because of a risk. A risk is not the same as a specific danger. Every time a motorist drives on the road there is a *risk* that an accident may occur, but driving is only *dangerous* when a particularly risky situation arises. So, for example, there is always a *risk* that a researcher might become a target for persons opposing animal research by unlawful and violent means, but the researcher's physical health would not be *endangered* unless a specific attack were made. We need to consider the likelihood of such an attack, and the likelihood of other conduct which would endanger mental health or other aspects of safety.

19. There is also a causation criterion to be met. We are not required to consider in the round the likelihood of the researchers or other persons being endangered, but specifically the likelihood of such endangerment as a result of disclosure of the requested information.

20. The issue for us under each exemption is whether it is engaged. If one or more exemptions are engaged, we must go on to consider the public interest balance.

21. The time that is primarily relevant for the application of these criteria is the time when the information request was dealt with by the University in 2008: see *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence* [2011] UKUT 153 (AAC) at [9]. If reasons for non-disclosure have arisen since then, we are entitled to take them into account in the exercise of our discretion regarding remedy: see

FOIA s58(1)(b), *Sittampalam v Information Commissioner and BBC* EA/2010/0141, 4 July 2011, and *Information Commissioner v HMRC and Gaskell* [2011] UKUT 296 AAC [15]-[31]. In practice in the present case the passage of time since 2008 has not in our view made any decisive difference to the relevant considerations.

The background facts

22. The purposes motivating the request, while not being of necessary relevance to the exemptions, shed some light on the public interests involved. BUAV's self-description on its website was relied on by Mr Sandell and was not disputed by the University. It stated:

> For over 100 years the BUAV has been campaigning peacefully to create a world where nobody wants or believes we need to experiment on animals. The BUAV is widely respected as an authority on animal testing issues and is frequently called upon by governments, media, corporations and official bodies for its advice or expert opinion. We work lawfully and professionally, building relationships with MPs, MEPs, business leaders and other decision-makers. We also analyse legislation and sit on decision-making panels around the globe to act as the voice for animals in laboratories. Our dedicated London-based team coordinates an international network of scientists, lawyers, campaigners, investigators, researchers, political lobbyists and supporters.

23. The BUAV is publicly opposed to, and gives no aid to, unlawful means of opposition to animal experimentation. When it publishes information it takes care not to publicise the names of individual researchers, notwithstanding such names being in the public domain.

24. While animal experimentation remains permitted in the UK, the BUAV tries to ensure that such experimentation is regulated in a manner that is rigorous, effective and compliant with the requirements laid down by Parliament. The BUAV opposes research on primates. It became aware of the likely existence of the information sought as a result of the research publications. It knew that the Berlin authorities had rejected an application for somewhat similar research on cost/benefit grounds given, in particular, the high welfare cost. The BUAV has concerns about the licensing of animal experimentation by the Home Office generally, and concerns about the licensing of this animal research in particular. It seeks to scrutinise the Home Office's decision-making, and to have the opportunity, if appropriate, to complain or to bring judicial review proceedings. It also seeks to ensure that there is informed public debate about research of this nature, and about its regulation. Without sufficiently detailed knowledge of the content of the licences, the BUAV can neither allay its concerns about the Home Office's decision-making, nor bring any sort of challenge to that decision-making. For these reasons, it sought disclosure of the information in the licences.

25. It is not in dispute that the public has a legitimate interest in knowing what is going on by way of animal research and the extent to which the regulatory functions of the Home Office are being properly discharged.[1]

26. We take the following summary of the three research papers substantially from Mr Sandell's written skeleton argument. For convenience he referred to them respectively as the technique paper, the anaesthetised paper and the awake paper.

27. *Thiele A et al. A novel electrode-pipette design for simultaneous recording of extracellular spikes and iontophoretic drug application in awake behaving monkeys. Journal of Neuroscience Methods. 158:207 (2006)* This paper describes a technique, developed by the authors, for implanting electrodes (for measuring electrical activity) and pipettes (for introducing drugs) into the brains of primates, so that the electrodes and pipettes can be used when the primates are awake and 'behaving'. The paper does not report any new scientific knowledge other than the development of the technique. The paper indicates that following initial training monkeys were implanted with a head holder (to enable restraint), an eye coil (to enable eye movements to be measured), and recording chambers above V1 (part of the brain – "V" stands for "visual cortex") under general anaesthesia. The recording chambers were treated with 5-fluorouracil (a chemotherapy drug) three times a week to keep them clean. "Despite 5-fluoro-uracil treatment it was necessary to perform dura scrapes every 6-8 weeks for the removal of fibrous scar tissue above the craniotomy". The paper reports testing the technique on a total of 'four awake behaving primates'. It says that "In all four monkeys we have performed more than 25 penetrations (in one monkey >50)". The figure of 25 must therefore be per monkey. The monkeys were seated in a 'primate chair' and required to press a 'touch-bar' in response to certain visual stimuli. Ms Thew's evidence explained that the macaques would have been restrained in the primate chair for the duration of the tasks. Readers of the technique paper are not told how many experiments were carried out, how long they lasted for (individually or cumulatively), how long the devices were left implanted for, whether there was any evidence of distress on the part of the monkeys, or what happened to the monkeys once the research had been completed. The sum of the reference to animal welfare considerations is a formal statement that various requirements and guidelines were complied with.

28. The technique paper acknowledges funding from publicly-funded bodies.

29. *Guo K et al. Spatio-temporal prediction and inference by V1 neurones. European Journal of Neuroscience. 26:1045 (2007)* This paper reported research into the way in which adult rhesus monkeys' brains process visual information. It might be described as basic science research: it investigates how monkeys' brains may work. It does not describe any immediate

[1] Reference was made by Mr Sandell to remarks to this effect by Eady J in *Home Secretary v BUAV* [2008] EWHC 892 (QB), [4]. See also the related discussion at [60].

application. Two rhesus monkeys were used for the research. They were anaesthetised and paralysed. Their skulls were opened and small electrodes were inserted into their brains to record electrical activity. While anaesthetised, their eyes were opened and they were shown visual stimuli. The electrical activity in response to these visual stimuli was recorded. Readers of the anaesthetised paper are told no more about animal welfare considerations than are readers of the technique paper.

30. The research in the anaesthetized paper also received public funding.

31. *Roberts M et al. Attention alters spatial integration in macaque V1 in an eccentricity-dependent manner. Nature Neuroscience. 10(11):1483 (2007)* This paper reports research into the way in which monkeys' brains process vision, and is basic science research, without any reported application. The monkeys were awake and required to carry out tasks. Three monkeys were used. They were implanted with the electrode/pipette apparatus described in the technique paper. The monkeys were apparently restrained in a primate chair, with their heads restrained too, and were required to respond to visual stimuli by releasing a 'touch bar'. Readers of the awake paper are told no more about animal welfare considerations than are readers of the other two papers.

32. The research in the awake paper received public funds.

33. ASPA makes provision for the protection of animals used for experimental or other scientific purposes in the UK. ASPA applies to all "protected animals" which are defined as being "any living vertebrate other than man". By s21 of ASPA, the Secretary of State must publish statutory guidance under the Act, which was made available to us and considered by us at the first hearing. ASPA exercises control over scientific procedures in three ways: (1) through project licences; (2) through personal licences; and (3) through certificates of designation of a place as a scientific procedure establishment. Section 3(1) of ASPA contains the key protection for animals used for such purposes. It states-

> No person shall apply a regulated procedure to an animal unless –
> (a) He holds a personal licence qualifying him to apply a regulated procedure of that description to an animal of that description;
> (b) the procedure is applied as part of a programme of work specified in a project licence authorising the application, as part of that programme, of a regulated procedure of that description to an animal of that description; and
> (c) the place where the procedure is carried out is a place specified in the personal licence and the project licence.

34. The term "regulated procedure" is defined in section 2 of ASPA. Generally, it means any experimental or other scientific procedure applied to a protected animal which may have the effect of causing that animal pain, suffering, distress or lasting harm.

35. The requested information is the information in two project licences. Project licences are governed by s5 of ASPA. By s5(3), a project licence shall not be granted for any programme unless the Secretary of State is satisfied that it is undertaken for one or more of certain specified purposes. The purposes include the advancement of knowledge in biological or behavioural sciences. In determining whether and on what terms to grant a project licence, the Secretary of State is required to weigh the likely adverse effects on the animals concerned against the benefit likely to accrue as a result of the programme to be specified in the licence. The Secretary of State must not grant a project licence unless he is satisfied (a) that the purpose of the programme to be specified in the licence cannot be achieved satisfactorily by any other reasonably practicable method not entailing the use of protected animals, and (b) that the regulated procedures to be used are those which use the minimum number of animals, involve animals with the lowest degree of neurophysiological sensitivity, cause the least pain, suffering, distress or lasting harm, and are most likely to produce satisfactory results: s5(6). Further, by s5(7), the Secretary of State shall not grant a project licence authorising the use of cats, dogs, primates or equidae unless he is satisfied that animals of no other species are suitable for the purposes of the programme to be specified in the licence, or that it is not practicable to obtain animals of any other species that are suitable for these purposes.

36. Further controls under ASPA include the role of veterinary inspectors and a specialist Animal Procedures Committee.

37. The project licence application is a detailed form. The application involves express consideration of the objectives of the research, the benefit of the research, the fate of the animals, the involvement of a veterinary surgeon, the research to be carried out, the adverse effects of the research on the animals, why techniques that give rise to fewer concerns about animal welfare cannot be used, and the categorisation of the severity of the suffering to be caused. The application involves expressly engaging with the balance between the suffering that may be caused to animals by the research and the potential benefits of that research. On approval, the application becomes the licence. The application is approved, allocated a licence number, and stamped by the Home Office. So the information sought by the BUAV is in substance the information contained in the applications, as subsequently approved by the Home Secretary.

38. There is a degree of secrecy to the regime. It is a criminal offence to carry out a regulated procedure as an exhibition to the general public. And there is the s24(1) offence of disclosure of information given in confidence for the purposes of discharging functions under the Act, the ambit of which is being considered by the Court of Appeal in this case.

Evidence

39. We received a substantial quantity of written evidence. This included the Bateson Review of Research Using Non-Human Primates, published in July 2011 by the Medical Research Council, which referred to the fact that some researchers using non-human primates are still experiencing an unacceptable level of personal risk. Relevantly to our public interest considerations, the Panel concluded-

> Effective knowledge transfer from the research laboratory to areas of wider application is a key issue in many areas of science, but is arguably even more pressing when the welfare of sentient creatures has been compromised during the search for improvements in understanding.

The Panel expressed a particular concern about the 9% of research programmes in their study from which no clear scientific, medical or social benefit had emerged.

40. We were also directed to advice published by Understanding Animal Research (UAR), a group which is a counterpart to BUAV. It promotes the view that humane animal research is crucial for scientific understanding and medical progress. In April 2009, after several years of research and consultation, UAR published 'A Researchers' Guide to Communications'. This advises that the risk from opponents of animal research can be minimised by the adoption of a more open and proactive approach to communicating with the public:

> Scientists and organisations that have communicated have not become targets as a result. On the contrary, the more institutions that are transparent, the less likely it is for any one institution to be singled out.
>
> The extremists are spread thinly, and very few individuals or institutions are currently targets of harassment and intimidation. At the end of 2007, the National Extremism Tactical Coordination Unit (NETCU) announced that crimes related to animal research were at a 30-year low. This trend has continued. .... most types of extremist activity are declining steadily. ....
>
> It is also important to note, that those institutions that have been targeted in the past were not open on this issue. Indeed, there is NO [*sic*] relationship between being open and being targeted.

41. The UAR guidance took into account the difficulties experienced at Oxford, on which Mr Pitt-Payne for the University placed considerable emphasis.

42. In addition to the documentary material, we heard evidence from a number of witnesses.

43. Mr Nicholls had been involved in investigating and policing animal rights extremism since 1995. He gave evidence about the nature of animal rights extremism in the UK and elsewhere, now and earlier years. He explained that there is a link between the type of research and the likelihood of violent extremist action, and said that in his opinion publicity could provoke such action. Injury to the physical or mental health or safety of researchers was unusual, but had occurred. It was ten years since there had been a physical attack on a researcher in the UK. The worst attacks on property had been in 2003-2005. The police had improved their methods. In 2007 a number of key activists had been arrested, and things had been much quieter since, with a few exceptions. He considered there was a possibility of direct action if the information were released; this was based on his understanding of the type of information involved, but he had not seen the information itself. He said he could not show a direct causal link between release of information and direct action. In closed session he told us about the impacts of various kinds of direct action and gave an example of an individual whose psychological health was affected by resulting stress.

44. Professor Flecknell is the University's Named Veterinary Surgeon (a formal position under ASPA). He expressed concern about the danger that, if research proposals for work that has not yet been carried out enter the public domain, those proposals may be adapted by others to apply for grant funding for their own work, to the prejudice of the University. This was relevant because not all the work in the project licences at issue has been carried out. It would be difficult to prove that any idea had been improperly taken or to take any effective action in that event. The University relies for its ratings on the quality of its research; this affects the funds it receives and its ability to attract both staff and students. He also expressed concern that some parts of the project licences containing detailed descriptions of procedures might be regarded as inflammatory to the animal rights movement. In closed session he gave us some additional information about the animal research situation at the University.[2] In cross-examination he agreed that the work in the two licences did not fall into the highest category, that of substantial procedures (ie, substantial in the severity of effects on the animals). He was referred to media coverage of the Tribunal's preliminary issue decision and the appeal to the Upper Tribunal. The coverage referred, among other things, to invasive techniques, implanting of electrodes, forcible restraint, and motivation of the macaques by restriction of fluids. As regards the latter, Professor Flecknell did not dispute having said to a journalist that the regime was not as restrictive as that which had been proposed in Berlin and having added:

> I go and watch these animals in the lab where they freely get into the chair; one of them voluntarily sticks his head in the right position and

[2] The additional information did not affect our overall view, in particular, because of the causation criterion under s38(1).

looks around as if to say “Where’s my Ribena, let’s go guys”. To me, that isn’t an animal that is distressed and is doing something because he is being forced to do it. They know that if they don’t cooperate they will get the fluid eventually.

He said that in relation to the proceedings in this Tribunal he had cooperated with the media as he had considered best, as part of a general policy of trying to be more open. The publicity had not resulted in any protests or threatening calls. He also gave us his view on the public interest balance, which was essentially that he was not convinced that release of the project licences would add constructively to public debate.

45. Professor Thiele is a prolific researcher with a substantial output of published articles. He described how in 2005 he and the Freie Universität Berlin had been the subject of a campaign of hate mail arising from the proposal for work there, which had caused him stress and sleepless nights. He told us that he took security precautions. The procedures in the German research, which he would have been able to carry out elsewhere than in Berlin, would have been more invasive than would be permitted in the UK. He expressed his concern that publication of more detail of the Newcastle experiments would be capable of ‘raising the heat’ in the animal rights debate, and in particular that the public could be misled by information being misinterpreted and taken out of context, and hence believing the techniques used were more severe than they actually were. He argued against there being any clear difference between basic and applied research; it was difficult to judge in advance the scientific or medical benefits that would flow from the former. His view differed from Professor Flecknell’s as regards the level of commercial risk if the unused research ideas were published, in that he regarded the level of risk as much higher. He had seen attempts to misuse information in the past. In closed session he gave evidence about which particular parts of the project licence he thought were of particular sensitivity, and why, and gave us further insight into the competitive nature of the grants system and the financial and related reputational risks for himself and the University if unimplemented research ideas were not protected from disclosure.

46. Ms Thew, the chief executive of BUAV, gave evidence relevant to the s38(1) exemption and to the public interest in disclosure. Following complaint to the Information Commissioner, another University had recently disclosed a project licence for research using cats, albeit with some redactions. There are currently (from Home Office statistics for 2010) some 186 establishments carrying out animal experiments in the UK, and 2,614 project licence holders. She referred to evidence about the marked decrease in unlawful protest activity since 2007, which she considered was part of a longer term trend, and she highlighted the advice from UAR. Many researchers had spoken openly on national media and had not been targeted. She quoted a recent article by the chair of UAR as saying, in support of the openness policy, that activists already knew which scientists used animals in their research, because peer-reviewed papers and

conference presentations were monitored by campaign groups. Ms Thew also expressed her views on the need for greater transparency to support public debate and for accountability. She referred to public concerns about the effectiveness of regulation by the Home Office and the BUAV's view that there had been demonstrable past failures, where the Home Office had failed to apply and enforce the law.

47. Dr Katy Taylor, senior science adviser at BUAV, gave evidence relevant to the commercial interests exemption, reminding us of the extent of the principles of peer review and publication which are part of the scientific research process. She considered that the likelihood of someone else exploiting an idea first, in the event of publication of the project licences, was very slim. She accepted that Professor Thiele had more experience than she did on how the research community operates. On the public interest in transparency, she referred us to the conclusions of the Bateson report cited above. She also expressed the view (despite the qualifications made by Bateson at paragraph 5.5.1-5.5.2 of the report) that pure research was harder to justify than applied research, both legally and ethically. She explained BUAV's concern about how the Home Office applies the cost benefit assessment, and the extent and limitations of BUAV's knowledge of experimental techniques and practices derived from the published literature, and of related matters such as how the animals are housed.

Endangerment of health or safety

48. The evidence supporting the s38(1) exemption was mainly the expression of fears by Mr Nicholls and the two professors. It was understandable that these fears were expressed, particularly given the past history of extremism and the sensitivity of experiments involving non-human primates. We have to look at the overall picture and make a judgment about the likelihood of the health or safety of individuals being endangered. The evidence showed that the unlawful activity which could produce that danger rarely occurs. We were impressed by the improvement in the situation in the period 2005-2007 and thereafter, and by the UAR evidence, which we found persuasive as a counterbalance to Mr Nicholls' opinions in regard to the effects of publicity. The publication of the three research papers did not trigger any extremist threats. The University followed the approach advocated by UAR in dealing with the publicity connected with the preliminary issues hearing, and no adverse consequences ensued. Refusal to communicate with the public carries its own risks, as UAR has explained, by creating the impression that there is something to hide. We think the relatively low level of risk from extremists has become clearer as a result of information and assessments emerging after the University took a view on the information request in 2008. A considerable amount of information about the animal research in the two project licences was then already in the public domain, both as regards the techniques used and the nature of the investigations. We have not found the necessary judgment an easy one to make. Having considered all the evidence and the arguments addressed to us, and keeping in mind the threshold and causation requirements discussed in paragraphs 15-19

above, we do not consider that the s38 exemption was engaged at the time the request was dealt with by the University.

49. The above conclusion is subject to one minor qualification. There was one piece of Professor Thiele's evidence about information which would be liable to be misconstrued and misused by a malicious person which on balance just persuaded us that (subject to public interest considerations) a particular passage in licence PPL 60/3362 should be redacted so as not to create a risk sufficiently substantial to engage s38. This was the passage of 5-6 lines coded as AC on page 269 of the closed bundle. To this very limited extent we accept the University's submission that disclosure would create a significant and weighty risk of endangering an individual's health or safety. In this connection we wish to make clear our view that information cannot generally be withheld simply because it might be misunderstood or taken out of context. A public authority can publish together with information released under FOIA whatever explanations or additional information it wishes. But we recognise that there comes a point where a particular piece of information may be so liable to be misunderstood and misused that the exemption is engaged.

Prejudice to commercial interests

50. The evidence on the s43(2) exemption was borderline, particularly given the difference of view between Professor Thiele and Professor Flecknell. The uncertainty which we felt was not in regard to the reality of the prejudice, if it eventuated, but in regard to the degree of likelihood of its occurring. In the end, having regard to Professor Thiele's relevant experience and ability to speak to this topic, we were just persuaded that there was a weighty chance of its occurrence, sufficient to engage the exemption.

51. The relevant passages in the licences are short, being only those where research ideas are set out which have not as yet been implemented. Dr Taylor's proposition that scientific secrecy ends at the point of publication was not applicable to these particular ideas. They were marked up in exhibit AT4 in the closed bundle. Where a research idea had not been implemented in 2008 at the time of the request, but has since been implemented, the University very sensibly did not rely on s43(2), since it would not provide an applicable exemption if a new request were made now.

The public interest balance

52. Because of our conclusions above, we can deal relatively briefly with the public interest balance. Substantially for the reasons relied on by BUAV,[3] we consider there can be no doubt about the strong public interest in animal welfare and in transparency and accountability as regards animal experimentation conducted under the ASPA regime. The existence of the statutory controls operated by the Home Office does not annul this interest, which extends to seeing how, and the extent to which, the statutory system is working in practice. Such private scrutiny as takes place inside the statutory system is not a substitute for well-informed public scrutiny. In the present case these interests are further underlined by the fact that the research was supported by public funds.

53. The public interest in maintaining the s38(1) exemption, where it is engaged, is also strong. Self-evidently, there would need to be very weighty countervailing considerations to outweigh a risk to health or safety which was of sufficient severity to engage s38(1).[4] Disclosure of the 5-6 lines coded as AC in licence PPL 60/3362 would add very little indeed to the public debate. The public interest in maintaining the s38(1) exemption easily outweighs the public interest in disclosing that very short passage.

54. The public interest in maintaining the s43(2) exemption is not as self-evidently strong as that in s38. A risk of financial loss is not inherently as critical as a risk of endangerment of a person's health or safety. But it is not to be dismissed too lightly, and we need to focus on how the public interest in disclosure would be served if the short passages containing unimplemented research ideas (as marked up at AT4) were released. It seems to us that they make very little difference. If substantially the whole licence is released, as we consider it should be, the public interest in disclosure is thereby served, and the purposes of transparency and accountability would be only slightly enhanced by including those short passages. We therefore conclude that the public interest in maintaining the s43(2) exemption for those passages outweighs the public interest in disclosure. We should add that we were not favourably impressed by BUAV's argument that the public interest would be served by unimplemented ideas being unethically taken and implemented more quickly by some other researcher.

Conclusions

55. The two licences as a whole are not protected from disclosure by the exemptions relied upon. One passage is protected from disclosure by s38(1). A small number of short passages are protected from disclosure by s43(2). Where those protections apply, the interests served by the

[3] See paragraphs 24-25, 39-40, 46-47 above. But we do not find it necessary to reach a view on the disagreement between Professor Thiele and Dr Taylor regarding the relevance or cogency of a distinction between pure and applied research.

[4] BUAV as a matter of policy made no submissions on the public interest balance applicable in the event that s38(1) was engaged.

exemptions outweigh in the circumstances of this case the public interest in disclosure.

56. The licences are therefore to be disclosed, subject to the necessary redactions. Our order will not take effect until final disposal of the pending appeal to the Court of Appeal.

Signed on original

Andrew Bartlett QC, Tribunal Judge

Attachments:

Appendix 1

Appendix 2

APPENDIX 1

REASONS FOR REFUSAL OF RENEWED APPLICATION REGARDING ACCESS TO REQUESTED INFORMATION AND PARTICIPATION IN CLOSED SESSION

57. On 1 July 2011 the Tribunal refused an application by BUAV that its counsel should be permitted to see the requested information and to take part in the closed session at the full hearing. The reasons for refusal were issued on 13 July 2011 and are reproduced below at Appendix 2. In light of the change of circumstances referred to in paragraph 18 of Appendix 2, BUAV sought a review of the refusal and renewed its application.

58. The change of circumstances was that the Information Commissioner indicated his intention not to attend the hearing by counsel to assist the Tribunal, because his decision notice had not considered the two relevant exemptions. I asked the parties for submissions on whether I had power to order that he so attend.

59. The procedure before the Tribunal is regulated by the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended. The parties drew attention to rules 2(3), 2(4)(b), 5(1), 5(3)(d), 11(1), 15(1)(g), 16, 33(2) and 36. The Commissioner accepted that there was a power under rule 15(1)(g) to require submissions and to make an order concerning how they were to be delivered, but submitted that such power would not justify an order for attendance in this particular case, given that the Commissioner had not considered the two exemptions and would have to expend scarce resources on doing so. Neither BUAV nor the University submitted that on the true construction of the rules the Tribunal had power to compel the Commissioner to attend by counsel.

60. It would normally be inappropriate to order a party to attend to make submissions when the party did not wish to advance submissions. If it had been considered sufficiently important, it would certainly have been open to the Tribunal to request that the Commissioner provide assistance by instructing counsel to attend. But it seemed to me that it would be wrong to order in this case that the Commissioner should appear by counsel, even if there were a power in the Tribunal to make such order.

61. BUAV submitted that the present case was not an appropriate case for the appointment of a special advocate, with the expense for the Tribunal Service which that would entail.

62. The principal submission made by BUAV in support of the renewed application was that I had asked myself the wrong question. The test should not be whether the Tribunal thinks it needs assistance on the closed material from BUAV's counsel. Rather, the Tribunal was required to ensure, so far as practicable, that the parties were able to participate fully in the proceedings as required by rule 2(2)(c). The proper questions were therefore:

    a. whether it was practicable for full participation to be achieved, and if not

    b. whether there were practicable measures that could be taken to reduce to a minimum the extent of non-participation.

63. This submission was followed up by a number of subsidiary submissions concerning what was practicable, and disagreeing with my assessment of the risks and consequences of inadvertent disclosure.

64. In support of the principal submission BUAV referred to Lord Dyson's remarks in *Al Rawi v Security Service* [2011] UKSC 34 at [10], [12] and [29].

65. BUAV also took issue with the distinction that I drew between proceedings in this Tribunal and other proceedings on the basis that the release of the information is the very question at issue (see paragraphs 14 d. to f. of my earlier reasons, with paragraph 14 a.).

66. *Al Rawi* was concerned with a civil claim for damages. The remarks at the cited paragraphs related to common law trial procedure. The basis of Lord Dyson's (qualified majority) reasoning in that case was that the court did not have an inherent power to dispense with fundamental elements of common law procedure – that was a matter for Parliament. The present tribunal is established under statutory provisions and its procedures are laid down by statutory instrument. See also *Tariq v Home Office* [2011] UKSC 35, where the closed material procedure adopted by a different statutory tribunal (an employment tribunal) was held to be lawful.

67. I do not accept BUAV's principal submission or its consequent analysis. I agree that rule 2(2)(c) is an important consideration, and indeed I took it into account in my earlier reasons, but I do not agree that it governs all other considerations. It is qualified by the phrase "so far as practicable" and must be taken into account alongside all other relevant considerations. Disclosure of the disputed information to the requester or its legal representative would in effect involve prematurely giving the requester a part of the outcome that it would obtain from the

proceedings themselves if successful; only very strong reasons would justify such a procedure.

68. I was also not persuaded by the further points made by BUAV about what was practicable.

69. In the event, the Tribunal did not require additional assistance at the full hearing. As it turned out, the help that we might have wished to request of Mr Sandell on the closed material, if we had considered it necessary and proper to ask for it, would have been on matters on which he would have needed to take BUAV's instructions. Taking instructions from his client would have been the very thing which, under the order that was sought by BUAV, he could not have done.

Andrew Bartlett QC, Tribunal Judge

APPENDIX 2

THE TRIBUNAL'S REASONS ISSUED ON 13 JULY 2011

[Introductory paragraphs 1-4 omitted]

Extent of access to requested information and participation in closed session

5. BUAV seeks an order allowing its counsel to see all the information within the scope of the request and to participate fully in the closed session at the final hearing, on terms that counsel should not without the consent of the Tribunal disclose any of the information thereby obtained, including to BUAV or its solicitor.

6. BUAV and the University have provided detailed written submissions respectively in support of and against this application. The Commissioner's view in this case is that BUAV's counsel need not, and therefore should not, have access to the disputed information.

7. In Campaign against the Arms Trade v IC and Ministry of Defence EA/2006/0040 (26 August 2008), the Tribunal observed that the role of the Tribunal was essentially inquisitorial and as an independent body it was well able in the vast majority of cases to conduct an investigation of closed material and evidence without the appointment of a 'special advocate' or similar representation. However, in the very special circumstances of that case and a related case,[5] where there was a large volume of security-sensitive material which was provided without explanation, piecemeal and in an incoherent manner, the Tribunal ordered the appointment of a special advocate to represent the appellants. The Tribunal considered that without such assistance the Tribunal would not be able to fulfil its function.

8. The office of special advocate was introduced by the Special Immigration Appeals Commission Act 1997 for hearings before the Commission: for the background, see Secretary of State for the Home Department v Rehman [2001] UKHL 47, [2003] 1 AC 153, [34]-[38]. A special advocate is given access to the closed material and represents the appellant in closed session, while also being present in the open session: see Secretary of State for the Home Department v Rehman [2000] EWCA Civ 168, [14]. The special advocate cannot normally communicate with the appellant or his legal representatives once he has seen the sensitive material: Roberts v Parole Board [2005] UKHL 45, [2005] 2 AC 738, [18]. Other statutes have made similar provision for special advocates: see Roberts, [26]-[29].

[5] Gilby v IC and Foreign and Commonwealth Office EA/2007/0071, 007 and 0079 (22 October 2008)

9. The 1997 Act made no provision for a special advocate on appeal from the Commission, so in the Court of Appeal in Rehman the Court appointed a special advocate under its inherent jurisdiction: see Secretary of State for the Home Department v Rehman [2000] EWCA Civ 168, [31]-[32]. The role has since been recognised in other situations where there is no specific statutory authorisation.

10. The role of special advocate is accompanied by practical difficulties identified in Roberts v Parole Board at [126] and in R v H [2004] UKHL 3, [2004] 2 AC 134, at [22]. These include the advocate's inability to report to his client or take instructions from his client on the points that emerge from the closed material, and the lack of the ordinary relationship of confidence inherent in any ordinary lawyer-client relationship.

11. An alternative strategy was mooted in BUAV v IC and Home Office EA/2007/0059 (30 January 2008) at [32], where the Tribunal stated:

> "It might have been possible to come closer to a decision on the application of the exemption to the facts of this case if some or all of the BUAV's legal team had been permitted to participate in the closed session, on appropriate terms as to confidentiality. Even then, it is conceivable that to be of real value the legal representatives would have required the assistance of their own technical expert, who would also have been subject to a confidentiality undertaking. This is a procedure that is not uncommon in litigation involving technical content and we think, with the benefit of hindsight, that it might have been of assistance in this case, although it would certainly have added to the length, complexity and cost of the Appeal. We think that it is a procedure that is at least worth considering if similar circumstances arise on future appeals."

12. It should be noted that this proposal is materially different from the appointment of a special advocate. An ordinary legal representative, authorised to see the closed material on confidential terms, would continue to communicate with the appellant after seeing it, and would take into account the confidential information when advising the appellant and taking decisions on the conduct of the case.

13. The suggestion that such a procedure be considered was taken up in Peta v Oxford University EA/2009/0076 (1 February 2010) and again in DEFRA v IC and Birkett EA/2009/0106 (13 May 2010). In each case, the Tribunal discussed the proposal at considerable length and decided against adopting it: see Peta at [7]-[24] and DEFRA at [12]-[42].

14. From the discussions in the above cases and other relevant considerations I draw the following:

a. The role of the Tribunal is somewhat different from the role of the Court in adversarial civil litigation. It is not simply deciding between the rival contentions of opposing parties. In a case under FOIA its function is to see that the relevant provisions of the Act are correctly applied, whether those provisions have the effect of requiring disclosure or of exempting information from disclosure. This involves consideration not only of the rights of the requester and the public authority but also of public interests. In some cases the Tribunal is concerned also with private rights and interests of persons who are not before the Tribunal, for example, persons who have supplied information to the public authority in confidence or whose personal data is included in the information requested.

b. The current rules of procedure under which the Tribunal operates[6] give it wide powers to fulfil its function in a way which pays proper regard to all the relevant private and public rights and interests. In the present context rules 2 (overriding objective), 5(1) (case management powers), and 35 (entitlement to attend and take part in hearing) are of particular relevance.

c. The Tribunal's powers under the rules are broad enough to permit the Tribunal, if appropriate, to make the order sought in the present case, which would allow the appellant's counsel to see the disputed information and to participate fully in the closed session at the hearing, on terms that counsel should not without the consent of the Tribunal disclose any of the information thereby obtained, including to his client or his instructing solicitor.

d. There are other kinds of legal proceedings in which information requiring protection from public disclosure is relevant to the issue which a Court or Tribunal is required to decide. Common instances are where information requires protection because of commercial confidentiality. However, there is no close analogy between proceedings before this Tribunal and either ordinary civil litigation or competition proceedings. In the latter forms of proceeding, there is often a need for controlled disclosure of confidential information to enable the issues in the case to be decided in a fair manner. That need is met pragmatically by means of a confidentiality ring (or 'confidentiality club') of legal representatives and, where necessary, independent expert witnesses, from which some or all party personnel are excluded. In such cases the confidential information happens to be relevant to the main issues, whereas in this Tribunal the question whether the information should be released to persons outside the public authority is the very question at issue.

[6] The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended by SI 2010/43 and SI 2010/2653.

e. There are other cases, both civil and criminal, where information held by public authorities is relevant to the issues, but is protected from disclosure by public interest immunity. In such cases, the Judge may (and sometimes should) look at the material in order to be satisfied that it ought to be withheld, but, if it is withheld, it is normally not disclosed at all (see, for example, RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10; [2010] 2 AC 110, [103]. In Somerville v Scottish Ministers (Scotland) [2007] UKHL 44, [2007] 1 WLR 2734, a procedure was devised under which the redacted parts of the documents were shown to the appellant's counsel on terms that they would not disclose the contents to any other person unless the Court decided that the document should be disclosed (cf Science Research Council v Nassé [1980] AC 1028, at 1077). There is some similarity between such cases and appeals to the Tribunal, in that public interests are involved in the question of disclosure, but the analogy is not close. As in commercial confidentiality cases, the information in question happens to be relevant to the main issues, whereas in this Tribunal the release of the information is the very question at issue.

f. By statute, the Information Commissioner and the Tribunal stand in a special position. There is no impediment upon their receipt of the sensitive information, because by s58 of the Data Protection Act 1998 (as amended) no enactment or rule of law prohibiting or restricting the disclosure of information precludes a person from furnishing the Commissioner or the Tribunal with any information necessary for the discharge of their functions under FOIA. The Commissioner and the Tribunal have a duty to give it appropriate protection pending the decision of the issue whether it should be released to the public.[7] Under these provisions the Commissioner and the Tribunal are able to have access to information to the extent necessary, however sensitive it may be, including (for example) Cabinet minutes, information affecting national security, information which is subject to legal professional privilege, and sensitive personal data.

g. The Commissioner, though a party to the appeal, does not have the specific objective of trying either to procure or to prevent the release of the particular information. His concern, like the Tribunal's, is to see that the Act is properly applied and to take proper account of the relevant private and public rights and interests. He argues for disclosure or non-disclosure according to his view of the application of the Act to the particular circumstances. Because his commitment is to the Act rather than to a pre-selected result, it is not unusual for his arguments to alter during the course of a hearing as evidence unfolds. In some cases he invites the Tribunal to alter his Decision Notice.

[7] In the case of the Commissioner and his staff or agents there is a specific statutory offence of disclosing such information without lawful authority: Data Protection Act 1998 s59, as amended.

h. In appeals which involve consideration of the requested information in closed session, the role of the Commissioner's counsel is of particular importance. Counsel is able to assist the Tribunal in testing the evidence and arguments put forward by the public authority.

i. However, irrespective of the assistance of the Commissioner, the Tribunal, as a specialist tribunal, can be expected to be able, at least in some cases, to assess for itself the application of the provisions of FOIA to the closed material (cf, in relation to SIAC, the remarks in RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10; [2010] 2 AC 110, [104]). The extent to which the Tribunal will be in a position to do this will depend upon the particular circumstances.

j. Until the Tribunal has decided whether the information is to be disclosed under FOIA s1, it must proceed on the basis that it may decide against such disclosure. The Tribunal must therefore be careful not to do anything which might prejudice that outcome.

k. Disclosure to the appellant's counsel on restricted terms would not itself amount to disclosure to the public under FOIA s1. But it would be attended by risks of prejudicing the outcome. There could be a slip of the tongue. Information could be given away by facial expression or body language, or by the way questions were asked or answered or submissions made, or by inference from advice given. A change in the approach of counsel after seeing the material could make apparent the content of the information, or some of it. Such risks are relevant to the exercise of discretion under the Tribunal's procedural powers.

l. Further risks may arise, beyond the individual appeal, because there are many individuals and organisations who are regular users of the right to freedom of information in pursuance of a particular interest. BUAV is one example out of many. If it became a regular practice to disclose requested information to counsel for the appellant, such counsel would over time build up a bank of knowledge concerning the topic of interest, derived from information which the public has no right to see. This could affect the person's or organisation's strategy in the use of the Act. I have observed above that, unlike a special advocate, an ordinary legal representative, authorised to see the closed material on confidential terms, would continue to communicate with the appellant after seeing it, and would take into account the confidential information when advising the appellant and taking decisions on the conduct of the case. By making the information available to counsel, in cases where there is no right to it, the appellant would over time derive illegitimate benefits.

m. Difficulties would also arise in relation to how appellants should be treated, who are not legally represented. An appellant may be wholly trustworthy and may offer an undertaking not to disclose the information unless the Tribunal so orders. If the information can be made available to counsel, why not to a trustworthy appellant? Yet to give it to the appellant, before the Tribunal has decided whether it is disclosable, would be to override the Act and undermine the Tribunal's function. Giving it to a lawyer acting as the appellant's representative is not far different from giving it to the appellant in person.

15. These considerations lead me to the conclusion that the type of order now sought should not be made, save in exceptional cases where, as a minimum, the Tribunal takes the view that it cannot carry out its functions effectively without the assistance of the appellant's legal representative in relation to the closed material. Whether there will be any such cases remains to be seen. The approach must depend upon the particular circumstances. In some cases the Tribunal will be able to deal with the matter without external assistance. In many cases all necessary assistance will be provided by counsel for the Commissioner. In a few cases it may be necessary to appoint a special advocate, despite the extra expense likely to be occasioned.

16. Where an order for disclosure to counsel alone is refused prior to the hearing, the Tribunal retains discretion over the matter. As the hearing unfolds it will be open to the Tribunal to keep the matter under review and, if necessary, make at that stage some limited disclosure on a point which cannot be dealt with in the absence of assistance from the appellant's counsel. Cf R v H [2004] UKHL 3, [2004] 2 AC 134, at [36].

17. I have seen the requested information. I am not currently of the view that the Tribunal will need assistance from the appellant's counsel in relation to the closed material in order to determine the issues remaining in this appeal. The application is therefore refused.

18. The above are my reasons for having refused the application on 1 July. It will be seen that among the reasons is the role of the Commissioner at the hearing. The anticipated role of the Commissioner was expressly relied upon in the University's written submissions. On 8 July the Tribunal received from the Commissioner's representative an email stating, among other things:

> "Having considered the circumstances of this particular case, the Commissioner does not at present intend to attend the hearing currently scheduled for 5 and 6 September 2011 or make any further submissions. In reaching this position, the Commissioner has particularly taken into account that the forthcoming hearing intends to consider the application of two exemptions which were not considered by the Commissioner in his

decision notice, and because the Tribunal has decided that the two exemptions should be considered in relation to information which the Commissioner did not consider when reaching his decision (i.e. all the information originally requested by BUAV as opposed to the narrower scope of the request as refined by BUAV in the course of the Commissioner's investigation). The Commissioner also notes that both of the other parties are legally represented."

19. In the light of this information, BUAV has now requested a review of the refusal of its application. The parties may send to the Tribunal within 7 days from today their further written submissions on (1) whether the Tribunal has power to order the Commissioner to attend the hearing by counsel and (2) whether the Commissioner's change of position should result in a different order being made on BUAV's renewed application. The Commissioner may also want to review his position.

[Extract ends]