Neutral Citation Number: [2008] EWCA Civ 870

Case No: C3/2008/1141

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QBD, HIGH COURT
MR JUSTICE EADY
QB/2008/APP/0148

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2008

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE CARNWATH
and
LADY JUSTICE HALLETT

- -

Between :

BRITISH UNION FOR THE ABOLITION OF VIVISECTION	**Appellant**
- and -	
1) THE HOME OFFICE	**Respondents**
2) THE INFORMATION COMMISSIONER	

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- -

Daniel Alexander QC & Kate Olley (instructed by British Union for the Abolition of Vivisection) for the Appellant
Tim Kerr QC & Karen Steyn (instructed by **Treasury Solicitors**) for the 1st Respondent
Akhlaq Choudhury (instructed by **The Information Commissioner)** for the **2nd Respondent**

Hearing date : Tuesday 15th July, 2008

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JudgmentLord Justice Carnwath:

1. This is the judgment of the court. The appeal raises a short question of construction under section 24 of the Animals (Scientific Procedures) Act 1986 ("ASPA"), viewed in the context of the Secretary of State's obligations under the Freedom of Information Act 2000 ("FOIA").

2. At issue is a request by the appellants ("BUAV") for certain categories of information supplied by applicants for licences under the Act. The request was refused by the Home Secretary, whose decision was upheld by the Information Commissioner, and ultimately by Eady J. He restored the Commissioner's decision following BUAV's successful appeal to the Information Tribunal. BUAV now appeals to this court.

The ASPA regime

3. Use of animals in scientific procedures is subject to detailed control under ASPA, for which the Secretary of State has responsibility. The Act contains a complete code for authorising animal experimentation. It requires an application to be made for a project licence. The licence may not be granted unless the Secretary of State is satisfied that the licensed work is for one of the purposes specified in the Act, and that the conditions laid down by the Act are met. The conditions include a so-called "cost: benefit" test under section 5(4), and a prohibition (section 5(5)) on granting a licence unless the Secretary of State is satisfied that the research objectives could not be achieved without the use of animals, and that the procedures use the minimum number of animals and the least suffering.

4. It is evident that to satisfy the Secretary of State on these matters the applicant must supply detailed information. The judge summarised the evidence:

> "It is clear from the evidence that those who seek licences from the Home Office for animal research will often be required to submit a great deal of detailed information beforehand which is sensitive or confidential for a variety of reasons. In particular, in order to satisfy the statutory requirements, it may be necessary for applicants to include material which is commercially sensitive, and/or potentially useful to competitors, and also details of locations and addresses which may be sensitive for security reasons. "

When a licence is granted under this regime, it takes the form of a covering letter to which the application form is attached as a schedule. It thus includes all the information supplied as part of the application. There is an example in the papers before us, dating from 1998. It runs to almost 40 pages, and includes, in some 30 closely-typed pages, a detailed scientific description of the project and its purposes, and the treatment of the animals concerned.

Protection of confidential information

5. Section 24 of ASPA, the construction of which is directly in issue, provides:

> "24. *Protection of confidential information*
>
> (1) 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*." (emphasis added)

A person guilty of an offence under this section is potentially liable to imprisonment for a term up to two years. Prosecution for this or other offences under the Act can only be brought by or with the consent of the Director of Public Prosecutions (s 26(1)).

6. The Freedom of Information Act 2000 ("FOIA"), which came into effect in January 2005, provides for a general right to request and obtain information from a public authority, subject to certain exemptions, some of which are defined as "absolute" (ss 1(1)(b), 2(3)). The absolute exemptions include sections 41 and 44:

> "41. *Information provided in confidence*
>
> (1) Information is exempt information if –
>
> (a) it was obtained by the public authority from any other person (including another public authority), and
>
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person…."
>
> "44. *Prohibitions on disclosure*
>
> (1) 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…"

Thus, in addition to the specific exemption for confidential information, the Act preserved existing prohibitions, such as that under section 24 of ASPA.

7. Under section 75, the Secretary of State for Justice is required to consider whether such previous prohibitions should be retained, repealed or relaxed (but not

strengthened). On 1 July 2004, Baroness Scotland, the Minister of State, informed Parliament that the Government had decided to retain section 24 for the time being but that the question would be reviewed in two years time. No further review has yet taken place. Mr Kerr QC for the Secretary of State assured us on instructions that such a review would be carried out, taking account of our judgment in this case, but he was unable to offer any timescale.

8. We should also mention FOIA section 19, under which every public authority is obliged to have a publication scheme, whereby it voluntarily discloses information to the public. The Home Office has established arrangements whereby it publishes on its website "abstracts" of applications for project licences, which take the form of summaries written by licence applicants. The BUAV request which gave rise to the present proceedings relates to the information in project licences represented by five particular abstracts. It is not suggested that such arrangements for voluntary disclosure (whether or not under a statutory scheme) can in any way affect the merits of arguments for or against disclosure in this case.

Home Office policy under ASPA

9. Until October 1998, licence application forms contained an assurance that all information given by applicants would be treated by the Home Office in confidence. In 1998, the National Anti-Vivisection Society ('NAVS') obtained permission to apply for judicial review against the Secretary of State. The case was not contested. We do not have details of either the grounds of the application or the disposal of the case.

10. What we do know is that in October 1998, the Secretary of State issued a Circular altering the previous practice, in the following terms:

> "*Confidentiality of applications*
>
> The guidance notes for completing licence and certificate application forms currently contain a commitment that applications will be treated in confidence at all stages. We have been notified that leave for a judicial review has been sought on the basis that this goes beyond the provisions of section 24 of the 1986 Act. It is also unlikely that such commitments can continue to be given in view of the proposed Freedom of Information legislation. We have therefore decided to delete these clauses from the guidance notes with immediate effect. We will, however, continue to abide by the terms of section 24 of the Act (unless and until it is repealed) - i.e. we will not disclose information given, or believed to have been given, in confidence."

11. On 14 December 2004, in a letter explaining the effects of the FOIA, the Home Office commented on the relationship of sections 41 and 44. It was assumed that information

provided before October 1998 under the assurance of confidentiality would be exempt under section 41. With regard to licensing information provided after October 1998, the letter stated:

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

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

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

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

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

The present proceedings

13. Against this background, BUAV made the present request for the purpose of clarifying the scope of the Home Office's disclosure obligations. Their position is that fuller disclosure about animal experiments is needed to enable "informed public debate". On 12 January 2005, BUAV wrote to the Home Office requesting the information in five specified project licences, taken from those for which abstracts had been published: They were entitled: Wound healing; Relief from chronic pain by use of antidepressants; Studying disorders of balance; Metabolism and excretion studies for new candidate drugs; Genetically modified animals & respiratory disease.

14. On 15 March 2005, Dr Richmond, the responsible officer at the Home Office, provided some further information, but otherwise rejected the request. On 10 August 2005, his refusal was upheld following an internal review by a Mr Sowerby, on behalf of the "Information Policy Team".

The Commissioner

15. BUAV then applied to the Commissioner for a decision (under FOIA s 50), whether the request had been dealt with correctly under the Act. For reasons which it is unnecessary to explore, this process took almost two years. We should note a letter of 21 February 2007, in which the Home Office responded to a list of questions put by the Commissioner. The following question and answer are relevant to the present issue:

> "**How do you feel the exemption applies in the light of the statement in your note of 14 December 2004 [regarding the withdrawal in 1998 of the blanket confidentiality assurance]?**
>
> Application of the exemption is entirely consistent with that statement. The statement confirms that we accept that *not all information in a project licence application is automatically confidential*. For example, we would not expect to need to treat as confidential information about the duration of the licence, the permissible purposes engaged, whether the research involves the use of specified substances (tobacco, alcohol), procedures (microsurgery) or species of animal (dogs, cats, non-human primates or equidae), referral to the Animal Procedures Committee and the severity band of the project. In addition, we accept that some general information contained in project licences about the background to the programme of work, its objectives and the actual procedures to be carried out may not be confidential. However, *which information is confidential and which is not has to be determined by considering the contents of each licence individually*. It is our contention that, in the present case, the published abstracts – prepared by the project licensees – capture the bulk of the non-confidential information that can be disclosed. Other information in the categories listed above was disclosed in response to the present request. " (emphasis added)

It is noteworthy that in these answers no material distinction was drawn between sections 41 and 44, and the question was expressed in objective form: "which information is confidential and which is not?"

16. The Commissioner gave his decision on 12 June 2007. He relied specifically on section 44 which he held had been "correctly applied", and, since it amounted to an

"absolute exemption", gave rise to no public interest issue. His reasons on the central question were:

> "23. To satisfy the third condition of the prohibition the Commissioner considered whether the Home Office knew or had reasonable grounds for believing the information to have been provided in confidence. The Commissioner is mindful of the note to licensees and the paragraph within the licence itself which highlights to applicants the implications of the Freedom of Information Act. The note states that information within the application which is not exempt from disclosure has to be provided to enquirers on request but that several exemptions may apply, it highlights the probability that section 24 of ASPA may prohibit disclosure and ends by stating that much of the information provided in a project licence application but not in the abstract is likely to fall within the exemptions.
>
> 24. The Commissioner also considered the abstract section of the licence application form which asks the applicant to provide a two page summary of the project and outlines the information it expects this to include, it also asks the applicant to avoid using confidential material in the abstract. The licence application also asks the applicant to sign a declaration agreeing for the abstract to be published on the Home Office web site.
>
> 25. In light of this the Commissioner considers that the Home Office has reasonable grounds for believing that the information contained in the licence, not already published in the abstract, will have been provided by the applicant with an expectation of confidentiality. The licence applications suggest to the applicant that anything not contained within the abstract will remain confidential and whilst the note to licensees informs licensees of the possibility of disclosure this is qualified by the Home Office's reference to exemptions which would probably apply if a request were made."

The Information Tribunal

17. BUAV appealed to the Information Tribunal. The tribunal's powers on an appeal are defined by FOIA section 58. Where it determines that the Commissioner's decision notice is "not in accordance with the law" it may allow the appeal and substitute such other notice as could have been served by the Commissioner (s 58(1)); for this purpose it may "review any finding of fact" on which the notice was based (s 58(2)). It was common ground before us that under this section the tribunal can conduct a full review of fact and law.

18. In evidence to the tribunal (dated 22 October 2007), Dr Richmond expressed his "firm

belief" that all the information in the licences, so far as not yet disclosed either in the abstracts or in the Home Office's previous letters, was "given in confidence". He referred in particular to information and technical details which might lead to the identification of establishments and staff, details of planned programmes of work, "the unique methods to be employed and the novel scientific issues to be investigated" and information which was "commercially sensitive'. He believed that the applicants had a "legitimate expectation" that all the withheld information would be kept confidential by the Home Office.

19. In his second witness statement (dated 11 December 2007), he referred to the manner in which the applications were handled within the Department:

> "The withheld information is confidential. It is not in the public domain. The moment the information for assessment arrives at the department from the prospective licence holders all the information is regarded as having been supplied in confidence and appropriate security measures are taken to protect the secrecy of that information. All information supplied in support of requests for authorities under the 1986 Act are assigned appropriate protective markings – with the lowest appropriate level of classification of this material being "RESTRICTED" in line with Departmental instructions.
>
> "RESTRICTED" information is considered to have one or more of the following properties: capable of causing substantial inconvenience or distress to any party; risk to any party's personal safety; substantial financial loss to any party, or cause of loss of earning potential to, or to facilitate improper gain for, individual companies; substantial damage to any party's standing or reputation; breach of proper undertakings to maintain the confidence of information provided by third parties, or statutory restrictions on disclosure of information…."

He added that, while no "blanket assurance" had been given that information would not be disclosed, applicants were assured that the Department would take "particular care" before disclosing information in a licence, that it would not disclose details of establishments or names of those involved, and that "it would not compromise the commercial interests of an individual or organisation, or their intellectual property rights".

20. BUAV's case before the tribunal, as it has been in this court, was that information should not be regarded as exempt by virtue of section 24 of ASPA unless it satisfied the tests for an action for non-contractual breach of confidence, as summarised by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47:

> "First, the information itself … must have the necessary quality of confidence about it. Secondly, that information must have

> been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

The main emphasis was on the first of those tests.

21. The tribunal agreed with BUAV's interpretation of the section:

> "16. On this issue we prefer the BUAV arguments. We think that, even though section 24 ASPA does not make specific reference to the law of confidence, the use of the phrase 'given in confidence' means that the information in question was entitled to protection under that law – it means that it was given in circumstances where, because of the nature of the information, the circumstances of the disclosure and the harm likely to result from disclosure, the person receiving the licence application had a legally enforceable obligation to keep it confidential. The effect of the Home Office's argument would be that the threshold for criminal liability in this area would be lower than that for civil liability. That would be a remarkable outcome and we do not believe that it can be right."

They thought that this approach would also have the advantage of providing "a set of well established rules, based on case law", which they contrasted with the apparent inconsistency of the Home Office's approach:

> "If it were right that the only test to be applied was whether the information had been passed to the Home Office in circumstances that were capable of giving rise to an obligation of confidence, then it would not be necessary, or appropriate, for it to make any separation between disclosable and non-disclosable information. Yet that is what it has done in conceding that not all the information contained in the licence applications may be withheld…." (para 17)

22. The tribunal went on to consider how this approach should be applied to the information in the licences before them. For this purpose, in order to preserve confidentiality pending a final decision, they had conducted a "closed session" in which they questioned Dr Richmond in the absence of representatives of BUAV. In spite of this, they were unable to arrive at a final determination as to which "specific elements" of the withheld information were confidential in the required sense. They had, however, identified a number of examples, based on the abstracts, which were explained in a confidential schedule to the decision. These led them to conclude that the Home Office had not carried out "the required level of review". Further, by relying too much on the result of discussions with the applicants of what they were willing to include in the abstracts, the officers had failed to apply the "appropriate rigour" in deciding what was truly confidential (paras 21-5). The tribunal did not

underestimate the burden of work which would result from its interpretation. Having themselves spent half a day in the closed session, they accepted that -

> "… it would have taken a great deal more time for every element of potentially confidential information to be identified, its true status to be established and the possible application of a public interest defence to be determined." (para 29)

The High Court

23. The appeal to the High Court was on a point of law only (FOIA s 59). Eady J held that, by relying exclusively on the principles laid down in *Coco v Clark,* the tribunal had applied "a flawed interpretation" of the law of confidence:

> "It is clear, for example, that the law of confidence is not confined to the principles governing the circumstances in which an equitable duty of confidence will arise; nor to the specialist field of commercial secrets. An obligation of confidence can arise by reason of an agreement, express or implied, and presumably also by the imposition of a statutory duty. Nowadays, in addition, it is recognised that there is a distinction to be drawn between "old-fashioned breach of confidence" and the tort now characterised as "misuse of private information"…"

24. He referred in particular to Lord Nicholls' discussion of the duty of confidence in *Campbell v MGN Ltd* [2004] 2 AC 457 at [14], where he said:

> "Now the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase "duty of confidence" and the description of the information as "confidential" is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called "confidential". The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information."

Lord Nicholls also referred to the impact of Article 8 and 10 of the Human Rights Convention, which -

> "… call for a more explicit analysis of competing considerations than the three traditional requirements of the cause of action for breach of confidence identified in (*Coco v Clark*)" (para 19).

25. Eady J thought that the words of section 24 should be given their ordinary English meaning, rather than a "specialist interpretation", and that the wording was to be distinguished from that of section 41:

> "… it is necessary to ask whether the hypothetical defendant in the criminal proceedings has a belief that the information *was* given in confidence…. One must concentrate, therefore, on the state of affairs arising at the time when the information was imparted. This is distinguishable from the situation contemplated in s.41 of FOIA, since that is focused upon whether or not there would be an actionable breach of a duty subsisting at the time when the relevant information would be revealed (by way of responding to a FOIA request)." (para 42)
>
> Further the hypothetical defendant must be taken to be a lay person (a minister or civil servant), who could not be expected to have knowledge of the circumstances in which an equitable duty of confidence arises and/or that criminal liability was to depend, in whole or in part, upon the reasonableness of an assessment as to where the public interest lay as to the disclosure, or otherwise, of a corpus of (largely technical) data." (para 43)

Applying that approach he agreed with the Home Office that the information was exempt under section 44.

BUAV's case

26. In this court, BUAV has repeated the case which succeeded before the tribunal. In summary, BUAV submits that section 24 only applies to information which attracts the protection of the law of confidence – in other words, information which meets the three *Coco* tests. This, it is said, is clear from the use of the term "given in confidence". That imports a requirement that the information was actually confidential. All the information should therefore be analysed to determine which parts (if any) meet these tests and which do not. A blanket approach is not permissible.

27. The practical implications of their case are best understood by reference to their commentary on the various elements of the one licence which is in evidence. This licence (number PPL 80/1344) was obtained during an undercover investigation at Cambridge University. In an Annex to the Skeleton Mr Alexander QC has helpfully summarised BUAV's case as to what, in general terms, is the correct approach to various types of information in the project licences. The review makes clear, for example, that BUAV has no interest in seeing "personal information", and is content for information to be supplied on an anonymised basis. Other elements are more controversial.

28. A good example is BUAV's commentary on the part of the licence entitled "protocols". That explains what is to be done to the animals and the methods of controlling suffering. This in BUAV's view is -

> "… information critical to determining whether or not the Home Office has acted correctly in categorising the procedure as involving (for example) 'moderate' or 'substantial' suffering within its system of categorisation."

In the Annex they explain what is seen as the correct approach to this part of the licence information:

> **"protocols**:. …As a general principle, the methodology to be used would not be confidential, even if what is sought to be ascertained and the identity of novel drugs or other substances to be used may be confidential. Many of the experimental procedures will be entirely standard…
>
> Similarly, it is very difficult to see how, in most cases, information about the adverse effects it is anticipated the animals will experience, and how these should be dealt with, can be confidential. This information is quite irrelevant (in the general case) to any patent (for example) that an applicant may seek to obtain. The actual impact on the animals (as opposed to the results of the experiment) would not ordinarily need to be included in a patent application, because it is usually not relevant to the 'invention' for which protection is sought. This is an important indicator of their non-confidential nature…"

Discussion

29. Although the case has had a long and tortuous history, the legal issue before us is narrow. The question is whether the tribunal was correct in law to read section 24 as importing, by implication, the three-part test derived from *Coco v Clark*. Mr Alexander QC did not seek to argue, that, if the tribunal's view of the legal test was wrong, the Commissioner's conclusion on the facts was irrational or otherwise objectionable. Accordingly, if the tribunal's legal criticism of the decision is held to be unfounded, there is no other reason for interfering with the Commissioner's decision, and the appeal must fail.

30. It is common ground, as we understand it, that in interpreting section 24 of ASPA, we must consider it in the context of the 1986 Act, and not through the spectacles of the later FOIA. Viewed in that perspective, we see no reason why it should not be read as meaning what it says. The section is couched in subjective terms, directed at the state of mind of the official or other person in possession of the information. It raises a simple question of fact: does he know or have reasonable grounds for believing that the information was "given in confidence". The latter words in turn direct attention to the position when the information was "given" and to the intentions of the giver at

that time, either as expressed or as reasonably to be inferred from the circumstances.

31. In our view, there is nothing in the statutory language or the context (or in the Parliamentary materials to which we were referred) to justify importing a separate, objective test derived from the law of confidentiality. The tribunal was concerned at the apparent anomaly that the threshold for criminal liability might be lower than that for civil liability. However, in our view it was a false analogy. The tests are different, and the purposes are different. The *Coco* tests were designed to hold a fair balance between competing commercial interests, in the absence of any contractual arrangement. There is no equivalent balance of competing interests in section 24. It is concerned with the relations of citizen and state. The applicant, required by the state to provide information for a particular purpose, is given statutory protection against its use without his consent for any other purpose. There is nothing in ASPA itself to require this interest to be balanced against any other interests, public or private, except perhaps that of the hypothetical defendant. In particular, there is nothing in ASPA to justify limiting the scope of the protection by reference to any more general interest in public information, such as was later given effect by the FOIA.

32. The distinction can be illustrated by reference to the information contained in the "profiles" mentioned earlier. BUAV argues that information about the actual treatment of the animals cannot be "confidential" if the procedures used are "entirely standard". We do not see the connection. Even if the procedures are standard, information about their use at a particular establishment can still be "given in confidence". The lack of originality might of course be relevant to the merits of an action against a commercial rival seeking to use that information to copy the experiments in his own processes. But it is no reason to limit the protection against misuse of the information by a public official, to whom it has been given for a specific statutory purpose.

33. In fairness to the tribunal, we would acknowledge that there has been some confusion and inconsistency in the stances taken at different times by the Home Office. There may have been good practical or policy reasons for not contesting the 1998 judicial review proceedings, but the result is that the legal basis of the concession is far from clear. It is not immediately obvious why, as a matter of law, the Home Office was precluded by the 1986 Act from giving a general assurance of confidentiality. The statement in the 1998 circular that the issue would thereafter be assessed on a "case by case" basis was unhelpful, in the absence of any indication of the criteria to be used in making the assessment. Subsequent departmental statements, some of which we have quoted above, do not fill the gap. Some appear to rely on a judgment as to the confidential nature of the material (for example, para 15 above), which, as the tribunal point out, is difficult to reconcile with the stance that the only issue is whether the information was "*given* in confidence".

34. Another source of difficulty has been the lack of any direct evidence or information about the viewpoint of licence-holders or applicants. Again, there may have been practical reasons for this, but it left a potentially awkward gap in the Home Office case. Until 1998 applicants were able to rely on a blanket assurance of confidentiality.

When that was withdrawn, they were given no specific assurance as to how any particular category of information would be treated. Thereafter, one might have expected any applicant who was particularly concerned about confidentiality to have sought at least some clarification of the department's likely approach to information supplied by him. If there have been such exchanges, we know nothing about them. In the event the Commissioner felt able to infer from the limited material available that applicants would have had an "expectation of confidentiality" for information supplied by them. As we have said, that factual conclusion is not subject to challenge in this court.

35. Finally, since the role and effect of section 24 are to be reviewed, we may offer two more general comments. First, the section does not seem to fit easily into the scheme of the FOIA. The form of the section is readily understandable in its original context. The emphasis is on limiting the use of information, for the protection of the applicant. An official wishing to use that information for some other purpose is likely to lean on the side of caution, in order to avoid criminal sanctions. In practice he is very unlikely to take the risk without express agreement from the applicant. The section seems much less well adapted to the use made of it in the FOIA section 44, where it becomes the criterion for exempting information from the general principle of disclosure. In that context it is much less easy to see why the wishes or expectations of the applicant should be the only consideration. Secondly, we agree with Eady J that a test based simply on "confidentiality" may not adequately reflect the developments in the modern law, including the law of human rights. We do not think that these developments throw any light on the issue before us, but it would be desirable for them to be taken into account in any general review.

Conclusions

36. For these reasons, we would dismiss the appeal, and, in agreement with the judge, confirm the Commissioner's decision.