THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/194/2011

PARTIES

The University of Newcastle upon Tyne (Appellant)

and

The Information Commissioner (First Respondent)

and

British Union for the Abolition of Vivisection (Second Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DETERMINATION ON APPLICATION FOR PERMISSION TO APPEAL

AND

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is (1) to give permission to appeal but (2) to dismiss the appeal by the appellant.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 10 November 2010 under file reference EA/2020/0064 does not involve an error on a point of law. The appeal is dismissed.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

The background to this application and appeal

1. The British Union for the Abolition of Vivisection (BUAV) made a request to the University of Newcastle upon Tyne ("the University") under the Freedom of Information Act (FOIA) 2000. BUAV wanted to obtain information contained in project licences issued under the Animal (Scientific Procedures) Act (ASPA) 1986 in respect of experiments on non-human primates carried out at the University. The University refused to disclose the information in question.

2. BUAV complained to the Information Commissioner. In his Decision Notice dated 3 March 2010 (under reference FS50215164) the Information Commissioner ("the Commissioner") decided that (i) the University did not hold the disputed information; and (ii), even if it did, the University was entitled to rely on the exemption in section 44(1)(a) of FOIA (there being a relevant bar to disclosure in the form of section 24(1) of ASPA). The Commissioner did not consider any of the University's other arguments (e.g. that if the information was held, then it was covered by the exemptions under sections 38 (health and safety) and 43 (commercial interests)).

3. BUAV appealed to the First-tier Tribunal ("the tribunal"). At its hearing on 15 September 2010 the tribunal took the two issues decided by the Commissioner as preliminary points. In its subsequent decision, dated 10 November 2010 (EA/2010/0064), the tribunal decided both points against the University. So the tribunal ruled that (i) the requested information was held by the University at the relevant time; and (ii) the information was not exempt from disclosure by virtue of section 44(1)(a) of FOIA. The tribunal, like the Commissioner, did not deal with the sections 38 and 43 arguments, or indeed any other grounds for refusing disclosure.

The application for permission to appeal

4. The University's application for permission to appeal to the Upper Tribunal was refused by the tribunal. The University renewed that application before the Upper Tribunal. I directed an oral hearing of that application and indicated that, if permission was granted, I was minded to deal with the appeal against the tribunal's decision on the two preliminary issues on a rolled-up basis. All parties helpfully consented to that approach (or, in the Commissioner's case, did not object).

5. I held an oral hearing of the University's application at Harp House on 21 April 2011. The University was represented by Mr Timothy Pitt-Payne QC and by Ms Joanne Clement of Counsel (Ms Clement had appeared for the University at the tribunal below). BUAV was represented by its solicitor, Mr David Thomas. The Commissioner has not taken an active part in these proceedings before the Upper Tribunal, other than to indicate that he maintains his position that the original decision notice was correct, as argued before the First-tier Tribunal. I am indebted to all the advocates for their detailed and helpful oral and written submissions.

6. I am satisfied that the arguments advanced by Mr Pitt-Payne and Ms Clement are arguable in the sense of being other than unrealistic or fanciful. That much is evident from the length of this decision. I am also satisfied that it is appropriate to give permission to appeal in terms of (I hope) assisting in the orderly development of the law, in that there has as yet been no appellate-level guidance on the circumstances in which requested information is "held" by a public authority. I understand Mr Thomas's frustration that this appeal on the preliminary points has delayed the tribunal below tackling the substantive merits of BUAV's request and its subsequent appeal, but I fear that is one of the occupational hazards of litigation. I therefore give the University permission to appeal to the Upper Tribunal. However, I am dismissing the appeal for the following reasons. Like the Commissioner and the First-tier Tribunal before me, I am not making any findings (nor indeed expressing any views) in relation to the sections 38 and 43 arguments, or any other possible grounds for refusing disclosure.

The Animal (Scientific Procedures) Act 1986 regime

7. This case can only be understood against the background of the regime established by the Animal (Scientific Procedures) Act 1986. I was taken through the relevant statutory provisions in considerable detail by both Mr Pitt-Payne and by Mr Thomas. I intend them no disservice by summarising what appear to be the core provisions for present purposes as follows.

8. Mr Thomas, naturally, took a step back from ASPA. His starting point was the Animal Welfare Act 2006, which creates various animal cruelty offences. However, section 58(1) of the 2006 Act expressly provides that "Nothing in this Act applies to anything lawfully done under the Animals (Scientific Procedures) Act 1986". According to its long title, ASPA provides "for the protection of animals used for experimental or other scientific purposes".

9. Section 2(1) of ASPA introduces the concept of "a regulated procedure", which 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." Section 3, which is headed "Prohibition of unlicensed procedures", then provides as follows:

> "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."

10. Section 3 accordingly provides for what might be described as "the three Ps" – the person, the project and the place must all be licensed by the Home Office. Section 4 makes provision for personal licences and section 5 for project licences, while section 6 governs the licensing of "scientific procedure establishments". The terms of sections 3-6 make it clear that the three types of licence (or, in the case of section 6, a "certificate of designation") are designed to interlock. Each licence must be in place, or there is a breach of section 3 of ASPA – and, leaving aside penalties under ASPA (see section 22), there is the risk of a criminal offence being committed under the 2006 Act.

11. Personal licences are granted to individuals with the appropriate education, training and competence and permit the holder "to apply specified regulated procedures to animals of specified descriptions at a specified place or specified places" (ASPA, section 4(1)).

12. Project licences are licences specifying "a programme of work and authorising the application, as part of that programme, of specified regulated procedures to animals of specified descriptions at a specified place or specified places" (ASPA, section 5(1)). They can only be granted "to a person who undertakes overall responsibility" for the programme, and only if the Home Office is satisfied that certain criteria (e.g. a cost-benefit analysis) are met (ASPA, section 5(3)-(6)).

13. Certificates of designation are governed by the general rule under ASPA section 7(1), namely that "no place shall be specified in a project licence unless it is a place designated by a certificate issued by the Secretary of State under this section as a scientific procedure establishment". Section 6(4)(a) stipulates that such a certificate can only be issued "to a person occupying a position of authority at the establishment in question". Home Office guidance, published under section 21 of ASPA, states that such individuals "must represent the governing authority of the establishment", and gives the example of a university registrar or director of a research institute (Home Office, *Guidance on the Operation of the Animal (Scientific Procedures) Act 1986* (HC 321, 23 March 2000), paragraph 4.5). The certificate must also specify a "named veterinary surgeon" (NVS) and a "named animal care and welfare officer" (NACWO) at the establishment (see section 6(5)).

14. Finally, section 24(1) of ASPA, which is headed "Protection of confidential information", provides for a criminal offence in the following terms:

> "(1) A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence."

Issue (i): did the University "hold" the disputed information?

The original request and the Commissioner's decision notice

15. BUAV's original request was for the information in two particular project licences which had authorised experiments on non-human primates which in turn had led to the publication of three specific papers in learned scientific journals. BUAV later modified that request to confine it to parts of sections 18-19 of the project licences in question, which described the research objectives, hypotheses, plans and experimental procedures. In short, BUAV wanted information on the scientists' methodology.

16. It was agreed that the University's governing body was a "public authority" for FOIA purposes (see FOIA, section 3(1)(a)(i) and Schedule 1, paragraph 53). It was also accepted that individual University employees who had ASPA functions (or "ASPA office-holders" in this decision) were not within the definition of public authorities. The University's argument before the Commissioner was that project licences were held by the NVS in order to carry out his (personal) statutory obligations under ASPA, and were not held by the University as such. The Commissioner appeared to conclude that that argument had some force, and in any event decided on the balance of probabilities that neither project licence was held by the University at the relevant time (although noting that in the case of one project licence the argument was "finely balanced").

The First-tier Tribunal's decision: findings of fact

17. The tribunal had access to much more evidence than the Commissioner (e.g. as to the role of the university registrar). Its findings of fact included the following (all numbers in square brackets refer to paragraph numbers in the tribunal's decision). Dr Hogan, the Registrar, was the certificate holder and had conceded that as such he represented the University's governing body [24]. The University, not Dr Hogan personally, provided the resources for the requirements of ASPA to be met: [24] & [35]. Professor Flecknell, as NVS, was responsible to Dr Hogan as part of his duties as a University employee [25]. The Ethics Committee, which reviewed all project licence applications in accordance with the requirements of the Home Office's Guidance (*Guidance*, paragraph 2.46), was a University committee rather than the Registrar's personal committee [27]. The University also had a management system in place to meet the requirements of the ASPA regime: [26] & [28].

18. Research on animals was an important part of the University's activities, with about 70 project licences in operation at any one time [29]. Dr Hogan explained that he made arrangements for Professor Flecknell to hold the project licences on his behalf [29]. The holders of the project licences in question were Professor Thiele and Professor Young; however the latter had gone on secondment in 2006 and had left the University's employment in 2009 [30] & [31].

19. Professor Flecknell, the NVS, held copies of both the (amended) first and the second project licences at the date of BUAV's request under FOIA in June 2008 [32]. Professor Thiele had the information in the amended first licence available to him at that time [33]. Various members of staff had access to the project licences under controlled conditions [34]. Both Dr Hogan, on behalf of the University, and Professor Thiele separately asserted intellectual property rights over the disputed information: [37]-[39].

The First-tier Tribunal's decision: conclusions on the law

20. A public authority is under a duty to confirm or deny "whether it holds information of the description specified in the request" and, if so, to communicate that information to the requester, subject to any exemptions (FOIA, section 1(1)). As the tribunal correctly noted, FOIA provides no precise definition of what it means to "hold" information. However, as the tribunal also noted, section 3(2) of FOIA provides a degree of explanation:

> "(2) For the purposes of this Act, information is held by a public authority if—
> (a) it is held by the authority, otherwise than on behalf of another person, or
> (b) it is held by another person on behalf of the authority."

21. The tribunal explained the effect of section 3(2) in the following terms:

> "**[47]** The effect of this subsection is to confirm the inclusion of information within the scope of FOIA s1 which might otherwise have been arguably outside it. The effect of paragraph (a) is that information held by the authority on behalf of another is outside s.1 only if it is held solely on behalf of the other: if the information is held to any extent on behalf of the authority itself, the authority 'holds' it within the meaning of the Act. The effect of paragraph (b) is that the authority 'holds' information in the relevant sense even when physically someone else holds it on the authority's behalf."

22. I accept that as an accurate analysis of the impact of section 3(2). Indeed, any other construction would be inimical to the purpose of FOIA, a statute which is, after all, designed "to make provision for the disclosure of information held by public authorities" (according to its long title).

23. In a passage which was central to its conclusions the tribunal then reasoned as follows:

> "**[47]** 'Hold' is an ordinary English word. In our judgment it is not used in some technical sense in the Act. We do not consider that it is appropriate to define its meaning by reference to concepts such as legal possession or bailment, or by using phrases taken from court rules concerning the obligation to give disclosure of documents in litigation. Sophisticated legal analysis of its meaning is not required or appropriate. However, it is necessary to observe that 'holding' is not a purely physical concept, and it has to be understood with the purpose of the Act in mind. Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority. Conversely, we consider that s.1 would not apply merely because information is contained in a document that happens to be physically on the authority's premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority. For example, an employee of the authority may have his own personal information on a document in his pocket while at work, or in the drawer of his office desk: that does not mean that the information is held by the authority. A Government Minister might bring some constituency papers into his departmental office: that does not mean that his department holds the information contained in his constituency papers."

24. There is no dispute but that the example given in the final sentence of this paragraph was taken from the official Explanatory Notes to FOIA (at paragraph 31).

25. The tribunal then dealt in some detail with submissions made by Ms Clement on behalf of the University (and which were expanded upon by Mr Pitt-Payne before the Upper Tribunal). These were essentially two-fold. First, it was said that the University did not "hold" the information in question as a matter of fact, applying the tests developed by the (former) information tribunal in *McBride v Information Commissioner and Ministry of Justice* (EA/2007/0105) and *Digby-Cameron v Information Commissioner* (EA/2008/0010). Second, it was submitted that as a matter of law the University could not "hold" the disputed information, as to do so would amount to a breach of section 24(1) of ASPA (see paragraph 14 above).

26. The tribunal rejected both those arguments, and concluded as follows:

"**[54]** We have set out our factual findings above. The animal research was a very substantial part of the University's activities, carried out for University purposes on University premises. The grants that were made to fund it were grants made to the University. The confidential information involved was generated within the University. The licences were physically held by Professor Flecknell as the NVS for the University's animal research, by arrangement with Dr Hogan, to whom Professor Flecknell was responsible. Dr Hogan was the certificate holder not in his personal capacity but precisely because as Registrar he represented the governing body of the University. In that capacity he held the information in the project licences. In our judgment the governing body held the information through him.

[55] We were referred to the short discussion of the familiar rules of attribution of knowledge to a corporate body found in the judgment of Arden L.J. in *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* [2007] EWCA Civ 197 at paragraphs 49 and 54-56. We found nothing there which required us to alter our view."

The Upper Tribunal's analysis

The approach taken by the First-tier Tribunal

27. I have included the lengthy paragraph [47] of the tribunal's decision in its entirety above (at paragraph 23) for one simple reason. I regard the approach set out there to the question of whether a public authority "holds" information as an accurate statement of the law.

28. The test that FOIA uses is whether the public authority "holds" the requested information. The choice of statutory language must be significant. The test is not whether the public authority "controls" or "possesses" or "owns" the information in question; simply whether it "holds" it (as was observed by the information tribunal in *Quinn v Information Commissioner* [(EA/2005/0010) at [50]). "Hold", as the present tribunal also noted, is an ordinary English word and is not used in some technical sense in the Act. That construction is also supported by one of the leading texts, *Information Rights: Law and Practice* by Philip Coppel QC (3rd edn, Hart Publishing, 2010), which observes that FOIA "has avoided the technicalities associated with the law of disclosure, which has conventionally drawn a distinction between a document in the power, custody or possession of a person" (p.339, para. 9-009). The tribunal's comments are consistent with the approach taken by Lord Reid in *Brutus v Cozens* [1973] AC 854 (at 861), namely that "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law."

29. More recently Lord Hoffmann, in explaining the significance of those dicta from *Brutus v Cozens*, noted that "many words or phrases are linguistically irreducible in the sense that any attempt to elucidate a sentence by replacing them with synonyms will change rather than explain its meaning" (*Moyna v. Secretary of State for Work and Pensions* [2003] UKHL 44 at paragraph 23). The tribunal in the present case was plainly alive to that very real danger. It (quite properly) did not seek to re-define or replace the word "hold" in any way. True, the tribunal ruled that "'holding' is not a purely physical concept", but that was necessary on a purposive construction of the legislation, bearing in mind the clear terms of section 3(2) of FOIA. Furthermore I do not regard the tribunal's reference to the need for "an appropriate connection between the information and the authority" as a misguided

attempt to replace the statutory language with its own "rather nebulous" test (as Mr Pitt-Payne put it). On the contrary, the tribunal was simply pointing to the need for the word "hold" to be understood as conveying something more than the simple underlying physical concept, given the intent behind section 3(2).

30. In the light of the findings of fact that it had made, the tribunal was entirely justified in reaching the conclusion that it did in paragraphs [54] and [55] of its reasons (see paragraph 26 above). I accept that the tribunal did not make any specific findings to the effect that the University held the information in question through the two project licence holders, Professors Thiele and Young. It did, however, make a clear finding of fact that Professor Flecknell, the NVS, held the licences, and that he held them on behalf of the Registrar, Dr Hogan, and that both of them were acting under their contracts of employment. In doing so the tribunal plainly took the view that the University's governing body held the information through the Registrar. As Mr Thomas argued, and the tribunal recognised ([55]), that was a straightforward application of the rules of attribution of knowledge to a corporate body ("In general, an employer is deemed to have notice of anything of which any of his employees obtains knowledge in the course of his employment": *per* Arden L.J. in *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd & Ors* [2007] EWCA Civ 197 at paragraph 49).

31. There are, of course, situations in which the normal rules of attribution do not apply (*Orr v Milton Keynes Council* [2011] IRLR 317 being a case in point). I do not think the tribunal can be fairly criticised for failing expressly to address the University's point that the rules of attribution do not apply where to do so would be to frustrate a statutory purpose. Rather, the tribunal's very clear findings on the overall structure of the University's operations made it clear that this was not such an exceptional case. Indeed, as Mr Thomas argued, to exclude the normal rules of attribution would be to frustrate the very purpose of the ASPA regime. The University, as a corporate organisation, had to know the details of the project licences in order to have systems in place to ensure that there were no breaches of licence conditions, which would run the risk not just of revocation of such licences (ASPA section 11) but also the commission of criminal offences (ASPA section 22).

32. In this context Mr Pitt-Payne placed great emphasis on the personal accountability of ASPA office-holders to the Home Office (and as demonstrated by Figure 1, labelled "Key Relationships", in the *Guidance*, p.15). The tribunal addressed this point, concluding that whilst this was an important feature of the regulatory regime, its purpose was to "avoid the danger of dilution that would result if the responsibilities were assigned merely to an institution", and it "should not be allowed to crowd out the larger picture" ([53]). On my reading the tribunal was perfectly entitled to reach this conclusion on the facts as found. In particular, the tribunal's finding that the Registrar was acting on behalf of the University at all times was the only feasible conclusion, given the wide-ranging and detailed nature of his ASPA responsibilities (see especially *Guidance*, paragraphs 4.12-4.40).

The University's submissions based on *McBride* and *Digby-Cameron*

33. The information tribunal decisions in *McBride v Information Commissioner and Ministry of Justice* and *Digby-Cameron v Information Commissioner* do not take the University any further forward.

34. In *McBride* the issue was whether papers in the possession of the Privy Council Office (PCO) (now part of the Ministry of Justice) but so retained on behalf of the University Visitor were "held" for the purposes of FOIA. The information tribunal

was "entirely satisfied" that the PCO held the information in question on its own behalf as a public authority – the PCO's role in Visitor cases was integral to its own functions [31]. The tribunal referred to the PCO's ability to manage and control that information, to edit or delete it, to have unrestricted access to it and to determine wider dissemination.

35. In *Digby-Cameron* – a summary hearing under rule 10 of the former procedural rules – the issue was whether the requester was able to use FOIA to obtain a transcript of an inquest hearing from the local authority which had provided the administrative support to the coroner. The tribunal took into account (at [14] & [15]) the considerations outlined in *McBride* and concluded that on the facts the local authority held the information solely on behalf of the coroner [19].

36. The tribunal below in the present case concluded as follows on the significance of *McBride* and *Digby-Cameron*:

> "**[49]** ... Depending on the particular facts of a case, the features referred to in those cases may be useful matters to consider when looking at whether the public authority holds the information, but they should not be read as if they had been intended as definitive tests of whether information is 'held', and we consider there is no warrant in the wording of the statute for regarding them as such..."

37. Again, I agree with the tribunal's analysis. It is noteworthy that in *McBride* itself the tribunal there expressly rejected a submission that the issue was determined by the respective statuses of the PCO and the Visitor:

> "**[27]** ... It is also not an issue that turns on who owns the information, nor on whether the PCO has exclusive rights to it, nor indeed on whether there is any statutory or other legal basis for the PCO to hold the information. Rather, the question of whether a public authority holds information on behalf of another is simply a question of fact, to be determined on the evidence."

38. In both *McBride* and *Digby-Cameron* the crucial issue was whether the information was held by the public authority (the PCO and the local authority respectively) "otherwise than on behalf of another person" (the Visitor and the coroner respectively) within section 3(2)(a) of FOIA. The observations of the two information tribunal panels have to be seen in that particular context. The decisions went different ways, but each outcome was entirely sustainable on its particular facts. Neither operates as any sort of precedent for the present case, where the focus was more on the factual issue of "holding".

The University's submissions based on section 24(1) of ASPA

39. In fairness to Mr Pitt-Payne, his challenge based on *McBride* and *Digby-Cameron* represented very much his secondary argument on the first ground of appeal. His primary submission was that the issue as to whether the University "held" the disputed information for the purposes of FOIA had to be determined against the backdrop of the ASPA regime. The tribunal, as noted above, had found that the Registrar, Dr Hogan, held the information in question (albeit through the NVS) on behalf of the University's governing body. However, Mr Pitt-Payne asked rhetorically, if it would be a criminal offence under section 24(1) of ASPA for the Registrar to disclose the information to the University's governing body (the governing body both being the embodiment of the public authority for the purposes of FOIA, but equally having itself no statutory functions under ASPA), then how could the University hold

that same information through him? Put in another way, if the Registrar could not lawfully disclose the information to other University officers and employees (unless they too had statutory functions under ASPA), then it could not be said that the University held the information – rather, it was the Registrar, pursuant to his personal responsibilities under ASPA, who held that information.

40. Mr Thomas attacked this submission as fundamentally misconceived. He submitted that section 24(1) of ASPA has no relevance to the question of whether the University held the disputed information. He argued that the tribunal was entitled to reach the conclusion it did (and indeed, he went further, was bound to do so) that the University held the information, given the ordinary meaning of "hold" and the principle of attribution discussed above. He also made detailed submissions on the scope of section 24(1), contending in particular that as the University already held the information in question, the Registrar could not "disclose" that same information to the members of the governing body and thereby commit a criminal offence under section 24(1).

41. I propose to deal with those arguments in more detail below. The tribunal below dealt with the University's submission on section 24 of ASPA in the context of the first preliminary issue because that was the way that the case had been argued before it. In my view, however, that is looking at the problem from the wrong end of the telescope. As Mr Thomas submitted, a key feature of the FOIA regime is the need to balance the interests of the requester and the public interest in the free flow of information with the legitimate interests of public authorities and third parties. Moreover, that balance is struck not by over-complicating the simple factual concept of whether information is "held" by a public authority – rather, it is achieved by the matrix of absolute and qualified exemptions and the application, where appropriate, of the public interest test. For that reason I take the view that the technicalities of section 24(1) of ASPA, whilst highly relevant to the potential application of the section 44 exemption, should not be allowed to cloud the factual issue as to whether the University "held" the information for the purposes of sections 1(1) and 3(2). That construction is supported by the analysis in *The Law of Freedom of Information*, by John Macdonald QC et al (2nd edn, OUP, 2009), where the authors note that the effect of section 3(2) is that FOIA "will have a very wide application, subject to the specific statutory exemptions provided for within Part II of the Act" (p.69, para. 4.76). There are, in addition, two further factors which reinforce my conclusion on this point.

42. First, the logic of Mr Pitt-Payne's argument is that in practice the question as to whether a public authority "holds" particular information for the purposes of FOIA in the first place may frequently have to be addressed by reference to the precise terms of some statutory prohibition on disclosure in other legislation. That would encourage public authorities to take the issue of whether the information was "held" as a preliminary point far more frequently than is currently the case, which would both over-complicate and delay proceedings before the Commissioner and the tribunal below. I do not believe that that would have been the intention of Parliament.

43. Second, as the tribunal emphasised, it is important not to lose sight of the larger picture – not just the particular arrangements in place at the University in this case, but the overall architecture and purpose of FOIA. The tribunal agreed with Mr Thomas's bold submission that the result for which the University contended "was an affront to common-sense" [56]. Whether or not that is right, and I am not sure I would have put it in quite such stark terms, I am reasonably confident that if the ordinary officious commuter on the Tyne & Wear Metro were presented with the scenario in the present case, their response would be along the lines of: "Has the University got the information BUAV requested? Of course it has. But presumably there may be

some defences it can use so it doesn't have to disclose some or all of it?" In the present case section 44 is one such exemption, and the only exemption which was considered by the Commissioner and tribunal below as a preliminary issue.

Conclusion

44. My conclusion, therefore, is that the First-tier Tribunal did not err in law on the first preliminary issue. In particular it correctly applied the meaning of "hold" as an ordinary English word to be determined as an issue of fact, reaching a conclusion that was justified by its own matrix of findings of fact. It did not actually need to consider whether the ordinary meaning of "hold" in sections 1(1) and 3(2) of FOIA was displaced on the basis of some close textual analysis of section 24(1) of ASPA.

Issue (ii): was the information exempt from disclosure under section 44(1)(a)?

The Commissioner's decision notice

45. Although the Commissioner concluded that the University did not hold the information in question, his decision notice was mostly devoted to the alternative issue as to whether there was a statutory bar to disclosure. The Commissioner concluded that all the conditions in section 24(1) of ASPA were made out, and that accordingly the section 44(1)(a) exemption was correctly engaged. This, of course, provides for an absolute exemption (section 2(3)(h) of FOIA) insofar as "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..."

The First-tier Tribunal's decision and reasoning

46. The tribunal predominantly dealt with the potential application of section 24(1) in the context of the first preliminary issue, as to whether the information was held (see [51]-[62]), and then summarised its findings in four short paragraphs under the heading "The exemption under FOIA s.44(1)(a)" (see [64]-[67]). I do not think that the tribunal can be criticised for so doing, given the way that the University's case was put to it. The tribunal's conclusion was that the section 44(1)(a) exemption did not apply, as disclosure by the University would not involve a contravention of section 24(1) of ASPA [67].

47. As to its reasoning, the tribunal at the outset explained why the issues of personal accountability under ASPA did not prevent the University holding the information in question as a matter of fact, given the larger picture ([51]-[56]). I have explained above why I find no material error of law in the tribunal's reasoning on that aspect of the case. The tribunal then turned to the particular terms of section 24(1) (see paragraph 14 above). Having referred to the leading authority on the scope of that provision (*British Union for the Abolition of Vivisection v Home Office & Anor* [2008] EWCA Civ 870), the tribunal analysed the ingredients of section 24(1) as follows:

> "**[58]** We note that the necessary ingredients of the offence are (with our emphasis):
>
> > a. that the person has <u>obtained the information in the exercise of his functions under ASPA</u>;
> > b. that the person <u>discloses</u> the information otherwise than for the purpose of discharging his functions under ASPA;
> > c. that the person knows or has reasonable grounds for believing the information to have been <u>given</u> in confidence.

> **[59]** Because of element b, the offence can only be committed by a disclosure made otherwise than for the purpose of discharging functions under ASPA. So, for example, if one Home Office official hands the information on to another Home Official, bringing that official into the circle of confidence within which the information is handled for the purposes of ASPA, that is not a disclosure contrary to s.24(1).
>
> **[60]** Of more importance to the present discussion are elements a and c. Because of those elements, the offence cannot be committed by the person or persons to whom the information belongs or from whom it originated. The offence applies only to those who have received the information because of their functions under ASPA. The persons who have commissioned or created the information are the persons whom s.24 seeks to protect. Those persons have not 'obtained' the information in the exercise of functions under ASPA, nor does it make sense to speak of the information as having been 'given' to them. If they choose to disclose the information, they are entirely free to do so, so far as ASPA is concerned. When Professors Thiele and Young published the articles reporting their research, it was for them to decide, in consultation with their University colleagues, what to publish and what to keep confidential.
>
> **[61]** According to the University's evidence, both the University and Professor Thiele considered themselves entitled to intellectual property rights in the information concerning Professor Thiele's research. In our view the reason that the information was 'ring-fenced' within the University, i.e., kept securely and only made available to those who had a justified reason for seeing it, was to protect the intellectual property rights which they claimed, and to reduce the risk of the information getting into the wrong hands to the prejudice of Professor Thiele and the University, not to avoid the commission of offences under ASPA s.24(1). A similar analysis would apply to the research led by Professor Young."

48. For those reasons, the tribunal rejected the argument that section 24(1) prevented the University from holding the information for the purposes of FOIA [62]. Later, addressing the specific issue of the potential application of section 44(1)(a), the tribunal referred back to its earlier findings to conclude that disclosure by the University was not prohibited by section 24(1):

> "**[66]** We have decided above that the University held the requested information at the material time. We do not consider that the University obtained the requested information in the exercise of functions under ASPA, nor was it given to the University in confidence. On the contrary, the information was generated within the University, and the University was not prohibited by s.24(1) from using or disclosing it, subject to the rights of Professor Thiele or Professor Young."

The parties' submissions on sections 24(1) and 44(1)(a)

49. The parties were agreed that the effect of section 44(1)(a) is that it required the tribunal to consider whether a non-FOIA disclosure would be prohibited. Mr Pitt-Payne further submitted that the purpose of section 24 was to provide a level of protection for those (such as university researchers) required under ASPA to disclose confidential information as part of the licensing regime. I did not understand Mr Thomas to dispute that proposition. However, they disagreed over whether section 24(1) of ASPA had the effect of engaging section 44(1)(a) in the present case.

50. Mr Pitt-Payne's submission was that in practice there were only two ways in which the University could disclose the information in question. The first was if the University's governing body directed an employee with actual possession of the information to disclose it to BUAV. The second was if the governing body itself was given the information by such University staff with an ASPA function as physically held it (and then presumably the governing body released it). The University's case was that both scenarios were prohibited by section 24(1) and so the exemption in section 44 of FOIA necessarily applied.

51. In the first scenario, so it was argued, the person physically holding the information was the holder of a statutory role under ASPA (e.g. the Registrar or the NVS). The information in the project licences was obtained by them in the exercise of their statutory functions under ASPA and had been given to them in confidence by the project licence holder. Disclosure to BUAV would not be made for the purpose of discharging any statutory functions under ASPA and so would amount to a criminal offence on their part. It was also suggested that the first scenario would entail the University procuring the commission of a criminal offence by another.

52. In the second scenario, again the criteria under section 24(1) were said to be met and indeed disclosure by the relevant staff to the University's governing body for the purpose of enabling it to disclose information to third parties outside the University would not be disclosure made for the purpose of discharging any statutory functions under ASPA.

53. Mr Thomas submitted that section 24(1) could not bite in the current context, and so the University could not rely on the section 44(1)(a) exemption. His first argument, put in the context of resisting the first ground of appeal, was that the Registrar would not be "disclosing" information to the University which it already knew, applying the normal rules of attribution discussed above, and because the information was generated within the University itself. As regards the meaning of "disclosure", he relied on dicta in the decision of the Court of Appeal in *Hinchy v Secretary of State for Work and Pensions* [2003] EWCA Civ 138.

54. Mr Thomas further argued that section 24(1) had no application where information was being circulated within a single institution such as a University. In doing so, he relied on the judgment of the Court of Appeal in *British Union for the Abolition of Vivisection v Home Office.* The Court's judgment was delivered by Carnwath L.J., who explained that section 24(1) of ASPA 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" (at paragraph 31). So, Mr Thomas submitted, section 24(1) did not apply within the University. Moreover, there was no need to press section 24(1) into service to deal with "internal predators" (e.g. rival academics within the same institution who might wish to gain access to the information for their own purposes); such issues were adequately dealt with by disciplinary procedures under contractual terms and conditions and by the general law of confidence.

55. Finally, Mr Thomas submitted that on a proper construction section 24(1) requires two separate actors – the giver of the information and the person who is both the receiver and the putative discloser. In order for section 44(1)(a) to apply, the latter must be a public authority, as only public authorities are subject to the duty to disclose under FOIA and so only public authorities can, or need to, rely on the exemptions under Part II, such as section 44(1)(a).

The Upper Tribunal's analysis

56. The University's arguments on this second point are at first sight rather stronger than they are in relation to the first preliminary issue. However, in my view the key to unlocking the inter-relationship between sections 24(1) and 44(1)(a) is Mr Thomas's final submission, summarised in the immediately preceding paragraph. The starting point is that the tribunal had already concluded – correctly, as I have found above – that the University "held" the information in question. The next question was whether it could rely on any of the exemptions in Part II of FOIA. By virtue of section 44(1)(a), information is exempt "if its disclosure (otherwise than under this Act) by the public authority holding it ... is prohibited by or under any enactment" (emphasis added). The phrase in parentheses means that any obligation to disclose under FOIA itself must be disregarded. So let us assume for the present that the University's governing body was to disclose the requested information in some other way, unconnected with BUAV's request – e.g. by revealing the information for the purposes of championing its research achievements in some glossy publication of the type issued by University press offices up and down the land. Would such a disclosure by the University be "prohibited by or under any enactment"? In particular, would it be prohibited by section 24(1) of ASPA?

57. At this juncture it is important to remind ourselves again of the precise terms of section 24(1):

> "(1) A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence."

58. A university is, of course, a legal person – it may, for example, be prosecuted for breaches of health and safety legislation, as indeed have several universities. However, in the hypothetical example outlined above concerning the glossy publication, the public authority itself, namely the university's governing body, simply could not commit the section 24(1) offence. First, it could only do so both if acting "otherwise than for the purpose of discharging [its] functions under this Act" (i.e. under ASPA) and also if the information had been "been obtained by [it] in the exercise of those functions". Yet the university's governing body itself has no ASPA functions and, moreover, the information was generated within the university. The ASPA functions, of course, are held by individual university employees who are personally accountable to the Home Office. Second, the public authority must know or have reasonable grounds for believing that the information was "given in confidence". The concept of information being "given", never mind "given in confidence", necessarily involves its transfer from A to B. Yet in the present case the University's governing body was not "given" the information – it held the information, on the tribunal's findings of fact. So the tribunal was right to conclude, particularly by way of its reasoning at [60] (see paragraph 47 above) that the University would not be committing a section 24(1) offence.

59. So where does this leave the two scenarios postulated by Mr Pitt-Payne? In the first scenario the ASPA office-holder would be instructed to disclose the information directly to BUAV, whilst in the second situation he would be required to disclose it to the governing body (for onward release). In the first example the disclosure is by and on behalf of the University, not by the individual concerned. In the second situation the University already has imputed knowledge, so there is no disclosure. In neither situation is the public authority, the University's governing

body, itself committing the offence of disclosure prohibited by section 24(1), given the analysis in the preceding paragraph, and so section 44(1)(a) is simply not engaged. There is the further argument that in the first scenario the University would be procuring the commission of an offence by the ASPA office-holder. It is unclear whether this argument was put to the tribunal below, and I neglected to clarify the point at the hearing before the Upper Tribunal. However, the fact remains that the public authority itself has no ASPA functions, and therefore it cannot commit a section 24(1) offence, and so section 44(1)(a) does not apply. In my view that is sufficient to dispose of the second ground of appeal, but in deference to the parties' careful submissions I will deal briefly with a couple of further points.

60. First, I agree with Mr Thomas that the act of disclosing "is the act of providing information not known to the recipient" (*per* Aldous L.J. in *Hinchy v Secretary of State for Work and Pensions* at paragraph 16; see also *per* Carnwath L.J. at paragraph 38). Mr Pitt-Payne is quite right to point out that the Court of Appeal's decision in *Hinchy* was reversed on appeal by the House of Lords ([2005] UKHL 16), but that was on a different point. However, I do not accept Mr Pitt-Payne's submission that the meaning of "to disclose" as set out in *Hinchy* is in some way peculiar to social security law, although the subtleties of what constitutes a "failure to disclose" has certainly generated some unique problems in that jurisdiction. There is ample authority from other fields that the ordinary meaning of "disclose" is "to expose to view, make known or reveal" (*Attorney-General v Associated Newspapers Ltd* [1994] 2 AC 238 at 255 *per* Lord Lowry) or "to bring to light or reveal something of which the third party was previously unaware" (*B.C.C.I. v Price Waterhouse* [1998] Ch. 84 at 102 *per* Laddie J.).

61. Second, I agree with Mr Pitt-Payne that section 24(1) may conceivably operate on staff within a university. I do not regard Carnwath L.J.'s reference to section 24(1) as being "concerned with the relations of citizen and state" (see paragraph 44 above) as necessarily suggesting otherwise, for two reasons. In the first place, that explanation was given in the specific factual context of the question as to the extent to which section 24(1) placed a restriction on third party Home Office officials who received information pursuant to ASPA. Furthermore, the underlined phrase in the following passage makes it clear that the Court of Appeal contemplated that section 24 might apply in other circumstances:

> "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 ..."

62. There is undoubtedly force in Mr Thomas's submission that the University's goal of keeping confidential information secure from "internal predators" may well be better served by contractual requirements and the law of confidence, not to mention practical security arrangements. Although section 24(1) is more likely to be directed towards disclosures by external third parties, such as Home Office officials, there is no reason why in certain circumstances an individual University employee and ASPA office-holder might not face liability under that provision. However, for the reasons above it is difficult to see how that might operate in the direct context of the employer/employee relationship within the University.

63. In this context I can only echo the concluding observations of the Court of Appeal in *British Union for the Abolition of Vivisection v Home Office*:

"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."

Conclusion

64. I therefore conclude that the First-tier Tribunal did not err in law on the second preliminary issue. The tribunal's conclusion was correct in law, namely that the section 44(1)(a) exemption did not apply, as disclosure by the University would not involve a contravention of section 24(1) of ASPA by the public authority.

Other information generated by University academics in their research

65. There was some discussion both in the written submissions and at the oral hearing of the extent to which universities more generally "hold" information, which has been generated by academics in the course of their employment, for FOIA purposes. The skeleton argument submitted on behalf of the University argued that the tribunal appeared to take the approach that any such information was "held" by the University, with potentially far-reaching consequences – e.g. that Professor X's research notes for his new book on The Hundred Years War were so held and thus potentially subject to disclosure under FOIA, subject to any exemptions that might apply. Mr Thomas suggested that it all depended on the circumstances, and in any event there might well be other relevant exemptions, even if such information was held for FOIA purposes.

66. I am happy to say I do not believe the issue arises for decision in the present appeal. The tribunal did not proceed by way of a generalised assumption that all information generated by university academics in the course of their research was necessarily held by their employing University for FOIA purposes – its conclusion was that this University held this information on the basis of the specific factual circumstances of this case. It did not purport to go further than that. For the same reason I do not think that the tribunal can be faulted for resisting the invitation to delve more fully into the issue of any competing intellectual property rights in such information as between the University and individual academics. It had made sufficient findings of fact to justify its conclusion that the University held the information in any event. I am also conscious that scenarios such as Professor X's research notes for his new book are not infrequently the subject of heated debates in SCRs and Senates around the country, not to mention problem questions in LLB examination papers. Fortunately those wider issues do not need to be addressed in the context of this appeal.

Conclusion

67. For all the reasons explained above, I give permission to appeal but dismiss the appeal. It will now be for a tribunal judge in the First-tier Tribunal to give further case management directions as regards the process for adjudicating upon the remaining substantive issues on BUAV's original appeal against the Commissioner's decision notice.

Signed on the original
on 11 May 2011

Nicholas Wikeley
Judge of the Upper Tribunal