ON APPEAL FROM:

The Information Commissioner's Decision Notice
No: FS50418656

Dated: 25th. June, 2013

Appeal No. EA/2012/0158

Appellant:	**Rhonda Moorhouse**
First Respondent:	**The Information Commissioner ("the ICO")**
Second Respondent:	**Department of Business Innovation and Skills ("BIS")**

Before

David Farrer Q.C.

Judge

and

Mike Jones

and

Narendra Makanji

Tribunal Members

Date of Decision: 12th. June, 2014

The Appellant appeared in person.

The ICO was represented by Edward Capewell

DBIS was represented by George Peretz and Julianne Kerr Morrison

Subject matter:

FOIA s.35(1)(b) Ministerial communications
s.43(2) Commercial interests

In relation to both exemptions, the balance of public interests.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 12th. day of June, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1. Huntingdon Life Sciences Limited ("HLS") is a prominent centre of biomedical research in the UK. Its conduct of laboratory experiments on animals aroused fierce opposition from animal rights groups over many years, involving, from some quarters, specifically a group "Stop Huntingdon Animal Cruelty" ("SHAC"), widespread violence and the threat of violence to HLS staff and premises and those of businesses which provided HLS with goods and services. Such was the perception of risk of those who contracted with HLS, that from about 2000, it was unable to obtain banking or insurance services.

2. To enable HLS to stay in business DBIS and its predecessor departments intervened and made and maintained arrangements for HLS to obtain such services. The fact that such assistance was provided was confirmed in answers to parliamentary questions in 2001 and 2002 and it has continued to the present.

3. The Appellant ("RM") is a passionate opponent of laboratory experiments on animals for the purpose of medical research. There can be no doubt of the sincerity of her convictions nor of her absolute entitlement to hold them. On the evidence before the Tribunal, she pursues a perfectly legitimate campaign without resort to intimidation in any form.

4. Equally, HLS is entitled to conduct a lawful business free of intimidation or harassment.

5. These perhaps trite observations preface this Decision because it must be entirely clear that the Tribunal is not concerned or qualified to make judgements on the highly controversial questions of the ethics and efficacy of experiments on animals. Its task is to determine whether information requested by RM relating to HLS should be disclosed by DBIS. Much of the voluminous evidence provided to it by RM did not bear on that question.

The Request

6. On 24th. April, 2011 DM made a request to DBIS in the form of five questions relating to the provision of banking and insurance services by DBIS and its predecessors since 2001.Following the provision of some information relevant to Parts 1, 2, 3 and 4 of the request at different stages, DM agreed ,subsequent to her complaint to the ICO, that his investigation hence his Decision Notice should be confined to Parts (Questions) 1 and 5. Those parts of the Request read as follows -

"1 For what purpose have banking and insurance services been provided to HLS since 2001 ?

. . . .

5 If any pay - outs have been made to HLS under the terms of the insurance services ?"

A request for information embraces all the information within the scope of the request "recorded in any form" (see FOIA s.84). That includes documents providing the evidence from which a summary answer to questions such as those posed here could be derived. If such documents existed, it was not open to DBIS to answer Part 5, for example, simply "yes" or "no". Hence no doubt, DBIS opposition to this appeal.

7. DBIS, as indicated, provided some of the requested information but refused to disclose any further information identified as falling within Part 1, in reliance on FOIA s. 35(1(b), s.38 (health and safety), s.40(2) (third party personal data) and s.43(2) (commercially sensitive information). An issue as to s.21 in respect of answers to two parliamentary questions, was resolved and did not require a decision.

The Decision Notice

8. In Confidential Annex A to his Decision Notice the ICO found that material contained in three documents held by DBIS were within the scope of Part 1 of the Request. He concluded that they were ministerial communications within s.35(1)(b), as was plainly the case. As to the third document, he ruled that s. 43(2) was also engaged , as it was in relation to the only document within the scope of Part 5. A further document contained in the closed bundle contained relevant information, which DBIS in due course disclosed and other information outside this Request, hence we are not concerned with it in this Decision.

9. Since both exemptions are qualified, the ICO proceeded to consider the competing public interests in disclosure and withholding the information. He acknowledged as to the ministerial communications the general interest in transparency and, more specifically, in understanding how and why central government should become involved in the provision of services, by whatever mechanism, to a commercial concern in the private sector. He discounted arguments based on the alleged responsibility of HLS for deaths resulting from ineffective testing of drugs and on the alleged corrupt involvement of the UK government. On the other hand he found that there were powerful reasons to withhold the information in the first three documents in the public interest, as set out in closed annex B. The same factors were relevant to the balance of interests when considering s.43(2) as

well as factors relating to the exposure of the insurance record of a private sector company. He concluded that the public interest favoured the maintenance of both exemptions as claimed by DBIS.

The Appeal

10. RM appealed. The appeal was determined initially on 13th. March, 2013 following an oral hearing by a differently constituted tribunal. It is unnecessary to rehearse the course of those proceedings save to note that the first - tier judge later set aside that decision pursuant to Rule 41 of the 2009 Rules on RM`s application on the ground that she had been deprived of a proper opportunity to adduce certain possibly material evidence and ordered a fresh hearing before a fresh panel of the Tribunal.

11. The initial grounds of appeal focussed on the alleged iniquity of HLS. They included the assertion that testing on animals was an inaccurate predictor of the effect of a drug on humans, that drugs tested in this way caused many deaths and that HLS was a danger to society. It was asserted that HLS, in contracting with the successor companies to the Nazi - backed chemical giant, IG Farben, demonstrated an immoral disregard for genocide and that DBIS, by providing HLS with banking and insurance services, which it could not obtain on the open market was distorting fair competition to the advantage of HLS. The ICO's findings as to possible prejudice to the commercial interests of HLS and the public interest in withholding the material information were also denounced. HLS conducted its business in a way that invalidated any claim to be entitled to protect its commercial interests. The Home Office failed to enforce the provisions of the Animal (Scientific Procedures) Act- 1986 against HLS and thereby conferred on it an unfair competitive advantage. In a skeleton argument dated 10th. February 2014, prepared by counsel, RM further submitted that the claim of a "chilling effect" if Part 1 of the Request were disclosed was too vague to be credible, that the need for a "safe space" had disappeared with the passage of time and that there was inadequate evidence of any likely prejudice to HLS' commercial interests arising from such disclosure The same argument applied to the refusal to disclose the insurance history in Part 5.

12. The ICO and DBIS argued that the history of intimidation in this case was critical to the claim that full and frank discussion between ministers would be inhibited by the prospect of disclosure even a substantial time afterwards. We deal with this point in a little more detail in the closed annex because there was some evidence in the closed bundle material to this issue. As to Part 5, they pointed out that no private sector company would normally be obliged to reveal its insurance history to the world and that it was unreasonable that HLS should be in a different position due to its vulnerability to intimidation of those with whom it formerly contracted. Both stressed, as is plainly the case, that it is not the role of the Tribunal to pass judgment on the efficacy or the morality of animal experiments nor on the policy of successive governments to assist HLS to remain in business.

The Evidence

13. RM served a very considerable volume of evidence on the Tribunal, including further material which we received only at the hearing. Almost all was directed to the submissions that HLS conducted its business irresponsibly and immorally, carried out inhumane experiments with animals and that the results of such experiments were an unreliable predictor of the effect of drugs on human beings. Such drugs, she argued, were a threat to human life and had caused many deaths.

14. As stated already, the Tribunal 's task is not to adjudicate on such issues but to determine whether, in relation to the information requested, the statutory exemptions relied on by DBIS are engaged and, if they are, whether the information withheld is of such value to the public's understanding of the government's intervention in the business of HLS as to outweigh or at least to equal the public interest in maintaining such exemptions. It follows that such evidence was irrelevant to our decisions because they had nothing to do with the value or morality of experiments on animals nor of successive governments' policy of supporting HL

Our Decision

15. It is inevitable that this open Decision deals with the issues in fairly general terms. The reasons why particular exemptions are engaged in relation to specific documents is discussed in the closed annex.

16. Part 1 involves four documents. The first contains material now disclosed to RM; so no decision is now required from the Tribunal . Documents 2 and 3 are documents addressed by a government minister to one or more ministerial colleagues. They clearly engage FOIA s.35(1)(b), which provides that information "held by a government department . . . . is exempt information if it relates to -

. . . .

(b) Ministerial communications".

S.35(5) defines such communications as any communications

"(a) between ministers of the Crown".

S.35(1)(a) (information relating to the formulation of policy) is also engaged for reasons briefly discussed in the closed annex, though the additional qualified exemption adds nothing to the issues on this appeal.

17. The fourth document is a background paper, which contains information *"likely to prejudice the commercial interests of . . . .(HLS)"* - see FOIA s.43(2).

18. For reasons already stated, the Tribunal emphatically rejects RM's contention that s.35(1)(presumably in its entirety) cannot be invoked because it applies only to information relating to "good governance", that is to say "correct" or "justified" policies. If that were so, the engagement of such exemptions would depend on the personal views of the ICO or the Tribunal members, as the case may be, a wholly untenable suggestion.

19. Likewise RM argues that "commercial interests" in s.43(2) is confined to interests of authorities or companies conducting approved types of business in a market free of any government intervention. The same comment applies with equal force. Not surprisingly, the relevant provisions of FOIA provide no possible support for any such interpretation of either exemption.

20. As to the engagement of s.43(2), it is not correct that no evidence has been tendered in support of the claim that HLS' commercial interests would be prejudiced by disclosure. The open version of the Decision Notice refers to consultations on this issue between DBIS and HLS and specific evidence in the form of a letter from HLS was included in the closed material. Even without such evidence, the Tribunal would quite readily infer that disclosure of document 4 (relating to Part 1) and of the documents relevant to Part 5 could damage HLS and probably others. Both contain information of potential value to a competitor - most obviously an insurance claims record. Furthermore, it is not difficult to envisage prejudice to HLS and others arising from animal rights extremists gaining access to such material.

21. Both exemptions are qualified; they are to be maintained only if the public interest in disclosure is outweighed by that in withholding the requested information.

22. Where the government decides to support a commercial entity, whether financially or by the provision of any other resource or assistance, there is a clear and significant interest in knowing why and how it has been done. That consideration is specifically relevant to Part 1 of the request, although the evidence of DBIS is that no insurance payments to HLS have or will come from public funds. More generally, there is the fundamental interest in transparency and accountability in public affairs, especially those of a major government department. Neither interest arises as regards disclosure of the claims records of HLS, which DBIS holds only as a result of the difficulties of HLS obtaining ordinary cover on the insurance market.

23. When adjudicating on the s.35 exemption, the Tribunal often approaches with a degree of caution claims by government departments as to the "chilling effects" of disclosure on frank and fearless advice and discussion. This, however, is not the typical case in which such claims are deployed. Government policy in relation to the support of HLS was formed and has been sustained because of violence and threats which were designed to put HLS out of business and thereby to inflict substantial damage on the life sciences sector of the economy. Supporters of animal rights are, of course, perfectly entitled to campaign vigorously but peacefully to outlaw animal experiments. However, such experiments remain lawful unless or until Parliament decides otherwise. HLS and its competitors are entitled to conduct their business free of intimidation or unlawful harassment. Whether or not government policy in relation to HLS is to be applauded, it is open to any government to enter into arrangements to preserve lawful commercial activity. That being so, government ministers must feel free to exchange candid opinions, options and possible solutions without the fear that their exchanges may be disclosed, perhaps long after they took place, thereby endangering the commercial interests of HLS and other identified entities or, still worse, the personal safety of their staffs. We conclude that such concerns remain very serious live issues, even after the passage of several years. This issue is further discussed in the closed annex.

24. We find that the interest in maintaining the s.35(1)(b) exemption in this case clearly outweighs any legitimate interest in disclosure of the two documents referred to for the reasons enunciated in paragraph 23. The same goes for the balance of interests in relation to s.43(2) as regards all the Part 1 documents.

25. We agree with the ICO that arguments about the need for a "safe space " for discussion of policy are much less compelling. Time has passed and policy has been formed and maintained.

26. As to Part 5, disclosure of the insurance claims records would entail an obvious risk, not only to the commercial interests of HLS, as stated above, but also to those of another entity. Past history further suggests the likelihood of threats to those associated with that other entity, which would again be designed to damage those commercial interests. We

have already indicated that public interest in disclosure of such records is plainly slight. The maintenance of the s.43(2) exemption is amply justified in respect of Part 5.

27. The exemption provided by FOIA s.38, where disclosure would or would be likely to endanger the physical or mental health or the safety of any individual , was not argued at length or in detail at the hearing. Suffice it to say, however, that the exemption is engaged on the evidence and the public interest in disclosure is far less than that of maintaining the exemption and safeguarding staff.

28. For these reasons and those developed in the closed annex we dismiss this appeal.

29. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

12th. June, 2014