

FOIA s.44 – Absolute exemption: prohibitions on disclosure

British Union for Abolition of Vivisection v IC & Secretary of State for the Home Department

EA/2007/0059

30th January 2008

Cases:

Coco v Clark [1969] RPC 41

London Regional Transport v The Mayor of London [2001] EWCA Civ 1491

Facts

The Appellants requested from the Home Office information relating “actual information” set out in each of the application forms that led to the grant of five animal experimentation licences under the Animals (Scientific Procedures) Act (ASPA) 1986. The Home Office refused to disclose certain information, not already set out in an abstract published on its website, on the grounds of the exemptions in ss.21, 38, 40, 41, 43 and 44 FOIA. The did however, disclose some additional information.

The IC concluded that the information had been obtained in the exercise of the Home Office’s function under ASPA, that disclosure to BUAV would not represent the discharge of any such function and that it knew or had reasonable grounds for believing that it had been provided in confidence. He considered that s.24 ASPA (imposing criminal liability for disclosure of information “ which has been obtained by him in the exercise of [the statutory functions] and which he knows or has reasonable grounds for believing to have been given in confidence.”

) would therefore apply to the disclosure of the information requested by BUAV and that this in turn triggered the application of the absolute exemption set out in FOIA s.44. Because s.44 was triggered he considered that it was not therefore necessary to consider whether any of the other exemptions also applied.

Findings

The Tribunal observed that the s.44 exemption would obviously not apply unless the withheld information fell within s.24 ASPA.

Did section 24 ASPA import the law on breach of confidence?

The Tribunal preferred the Appellants’ argument that Parliament’s clear intention when enacting s.24 ASPA had been to incorporate the law of confidence – including all of the *Coco v Clark* tests; namely a) does the information in question have the necessary quality of confidence? b) If so, was it disclosed in circumstances that gave rise to an obligation to maintain its confidentiality? c) Would its disclosure in breach

of that obligation cause harm to the person who made the original, confidential, disclosure? – and that, if this was not the case, it would be possible for an applicant for a licence simply to assert that all of the information in its application form was confidential and, in that way, effectively avoid disclosure by the Home Office under FOIA.

The Tribunal held that, even though s.24 ASPA did not make specific reference to the law of confidence, the use of the phrase “*given in confidence*” meant that the information in question was entitled to protection under that law – it meant 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.

They rejected the Home Office’s argument that it was not Parliament’s intention to require a prosecutor under ASPA to establish an actionable duty of confidence. If it had, some of the information which an applicant was required to disclose might be too imprecise for it to form the basis for a successful prosecution, given the standard of proof that would be applied in those circumstances. It was rejected on the basis that the effect of the argument was that the threshold for criminal liability in this area would be lower than that for civil liability which the Tribunal did not feel was right.

The Tribunal commented that the importing of the law of confidence in this way had the advantage of providing a set of well established rules, based on case law, to be applied by a public authority when assessing information. This was preferable to the alternative, under which the test to be applied by the public authority would be very imprecise.

It followed from the Tribunal’s conclusion on this point that the Home Office, on receiving the request for information about the licence applications, should have withheld from disclosure only those elements of the information it contained which were protected by the law of confidence. The circumstances in which the information had been provided to the Home Office were clearly capable of giving rise to an obligation of confidence, so that the second element of the *Coco v Clark* test was clearly satisfied. As to the third element the Tribunal thought that it would almost certainly follow in cases of this type that the disclosure of information from a licence application which satisfies the first element will constitute a commercial or technical secret the disclosure of which would cause the applicant harm. The Home Office was therefore entitled to concentrate principally, if not solely, on establishing whether any of the withheld information possessed the necessary quality of confidence.

Was the withheld information in fact entitled to protection under the law of confidence?

The Tribunal were not able to reach a final determination on which specific elements of the withheld information, if any, constitute confidential information, judged against the criteria mentioned. However, they were able to say that the Home Office did not carry out the required level of review in this case. This was based on two factors. First, they found a number of examples of specific information which did not appear in the abstracts but did not appear to be confidential information, applying the test required by the law of confidence.

Second, with regard to the process which the Home Office carried out when responding to the original request, some of its staff had reviewed each of the licence applications in question with the applicants in the course of workshop sessions. The Tribunal did not accept that the disclosure of just the information which the applicants themselves decided should be included in the published abstracts involved in this appeal satisfied the obligations imposed on a public authority by the FOIA. FOIA s.1(1)(b) required the Home Office to disclose information unless permitted to withhold it under s.2(2)(a), on the ground that it was covered by the absolute exemption set out in s.44. The interplay of those provisions imposed on it an obligation to consider which elements of the information set out in each licence application were protected from disclosure by an obligation of confidence. The Tribunal were not satisfied that this exercise was carried out with appropriate rigour, even though it did lead to some further information being disclosed by the Home Office in the course of considering the BUAV's original request. They therefore concluded that not all of the withheld information is protected by an obligation of confidence owed to the licence applicants. They directed that the Home Office re-examine the information in dispute and identify which specific elements of each licence application would have been protected by the law of confidence, as encapsulated in the *Coco v Clark* test, at the date of the original refusal to disclose.

Would a public interest defence be available to defeat a claim for breach of confidence?

The Home Office argued that the public's legitimate interest in animal experimentation and the regulatory system applied to it under ASPA did not outweigh the public interest in maintaining confidentiality.

The Tribunal generally rejected the Home Office's arguments; however, the Tribunal asserted that they could not make a definite conclusion on the points raised until the exact content of any additional information that was found to fall outside the s.24 prohibition was seen following the review the Tribunal had instructed. However, they did make a comment in reference to the Home Office's argument that disclosure might lead research organisations to move their operations to a country where confidential information was more securely protected which might have a detrimental effect on the UK science base, which is considered vital for its future economic progress and that animal experimentation may thereafter be conducted in countries with a lower animal welfare standard. They stated that these considerations should carry significantly less weight than those already considered, when the detailed analysis comes to be performed.

Conclusion

The Tribunal allowed the appeal in part and directed the Home Office to reconsider its assessment of the disputed information, in the light of the Tribunal's interpretation of s.44 of the FOIA, (when read in conjunction with s.24 of the ASPA) and its guidance as to the appropriate procedures to follow under those provisions. The Tribunal further directed that, once that reconsideration had taken place, the application of s.44 of the FOIA to any of the disputed information that continued to be withheld at that stage be considered at a further hearing. That further hearing would also determine the possible application of the other exemptions relied on by the Home Office, namely

those arising under ss.21, 38, 40, 41 and 43 of the FOIA. However, this review never took place as the decision was successfully appealed to the High Court.

Observations

The Tribunal were aware of the practical consequences that followed from their decision regarding s.24 ASPA. They observed that the time taken to review the relevant material in future cases might well be extended if the licence applicant's own assertions as to confidentiality have to be evaluated. This may create particular problems in responding to a request for information within the 20 working day limit imposed on public authorities by FOIA s.10(1). They had a great deal of sympathy for any public authority which is placed in the position of having to take a decision, which could lead to criminal liability if wrong, against a tight timetable. However, they felt that this was not a reason which required them to depart from the conclusion reached as to the correct interpretation of s.24 ASPA.

Also it was hoped that the conclusions reached on the interpretation of s.24 ASPA would reduce the need to spend time on either s.41 or s.43 of the FOIA and that the Tribunal's comments on the risk to individuals, additional to that already caused by public domain material, would also enable the time to be spent on FOIA s.38 to be reduced.